

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-11977

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In the Matter of:

GENERAL GROWTH PROPERTIES, INC., et al.

Debtors.

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United States Bankruptcy Court

One Bowling Green

New York, New York

May 13, 2009

11:26 AM

B E F O R E:

HON. ALLAN L. GROPPER

U.S. BANKRUPTCY JUDGE

1
2 HEARING re Debtors' Motion for Interim and Final Orders to
3 (i)Honor Tenant Obligations; and (ii)Authorize Financial
4 Institutions to Honor Related Checks and Transfers

5
6 HEARING re Debtors' Motion for Interim and Final Orders
7 Pursuant to Sections 105(a), 345(b), 363(b) 363(c) and 364(a)
8 of the Bankruptcy Code and Bankruptcy Rules 6003 and 6004
9 (A)for Authorization to (i)Continue Using Existing Centralized
10 Cash Management System; (ii)Honor Certain Pre-Petition
11 Obligations Related to the Use of the Cash Management System;
12 and (iii)Maintain Existing Bank Accounts and Business Forms;
13 (B)for an Extension of Time to Comply with Section 345(b) of
14 the Bankruptcy Code; and (C)Scheduling a Final Hearing

15
16 HEARING re Debtors' Motion Requesting (I)Entry of (A)Interim
17 and Final Orders (i)Authorizing the Debtors' Use of Cash
18 Collateral and Granting Adequate Protection Therefor Pursuant
19 to Sections 361 and 363 of the Bankruptcy Code and Bankruptcy
20 Rule 4001; and (ii)Modifying the Automatic Stay; and (B)a Final
21 Order Authorizing Borrowing with Priority Over Administrative
22 Expenses and Secured by Liens on Property of the Estates
23 Pursuant to Section 364(c) of the Bankruptcy Code; and
24 (II)Scheduling of a Final Hearing on Each Requested Final Order
25

1
2 HEARING re Debtors' Motion for Entry of a Protective Order
3 Pursuant to Sections 105(a) and 107(b) of the Bankruptcy Code
4 and Bankruptcy Rule 9018 Establishing Procedures for the
5 Protection of Confidential Information in connection with
6 First-Day Motions
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25 Transcribed By: Lisa Bar-Leib

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1 P R O C E E D I N G S

2 THE COURT: This is General Growth Properties. Are
3 we ready?

4 MS. GOLDSTEIN: I believe, Your Honor, that we are
5 ready.

6 THE COURT: All right. I'll take appearances. And
7 I'll take appearances first from those in the courtroom and
8 then from anyone on the telephone who wishes to appear and to
9 speak.

10 MS. GOLDSTEIN: Okay. Your Honor, Marcia Goldstein,
11 Weil Gotshal & Manges on behalf of the debtors. And also
12 appearing today, my partners, Gary Holtzer, Adam Strochak and
13 Melanie Gray.

14 MR. STAMER: Good morning, Your Honor. Michael
15 Stamer, James Savin and Chuck Gibbs from Akin Gump here on
16 behalf of the official committee.

17 MR. CROSS: Good morning, Your Honor. Greg Cross and
18 Ed Smith from Venable on behalf of CWCapital Asset Management,
19 Midland Loan Services, ORIX Capital Markets and JE Robert.

20 THE COURT: And are you still an informal spokesman
21 for an --

22 MR. CROSS: I am --

23 THE COURT: -- informal group of lenders?

24 MR. CROSS: I am, Your Honor.

25 THE COURT: Very good.

1 MR. GOTTESMAN: Good morning, Your Honor. Lawrence
2 Gottesman along with my colleagues, Michelle McMahon, Lloyd
3 Palans, Keith Aurzada, of Bryan Cave on behalf of multiple
4 property level secured lenders.

5 MR. YUDELL: Good morning, Your Honor. Kenneth
6 Yudell of Aronauer, Re & Yudell on behalf of a number of
7 lenders whose loans are being serviced by Centerline Servicing.

8 MR. FELDMAN: Good morning, Your Honor. David
9 Feldman and Matthew Williams from Gibson, Dunn & Crutcher on
10 behalf of the proposed DIP lenders.

11 MR. REILLY: Good morning, Your Honor. Michael
12 Reilly from Bingham McCutchen on behalf of Teachers Insurance.
13 We're part of the informal secured group speaking today in our
14 capacity as mez lender and lenders of certain nondebtor
15 entities.

16 MS. REED: Good morning, Your Honor. Margery Reed
17 from Duane Morris on behalf of Principal Life Insurance
18 Company.

19 MR. SAMSON: Good morning, Your Honor. Paul Samson
20 of Reimer & Braunstein on behalf of the 2008 facility lenders.

21 MS. VAN ROY: Good morning, Your Honor. Jantra Van
22 Roy, Zeichner Ellman & Krause LLP on behalf of several mall
23 lenders serviced by Helios.

24 MR. MASUMOTO: Good morning, Your Honor. Brian
25 Masumoto for the Office of the United States Trustee.

1 THE COURT: I'll continue on the left side of the
2 courtroom.

3 MR. BALDIGA: Good morning, Your Honor. William
4 Baldiga of Brown Rudnick for the Wilmington Trust Company as
5 indenture trustee for the 3.98 percent convertible bonds and
6 for an ad hoc consortium of holders of those bonds and for
7 Capital Ventures and Fashion stakeholders. Thank you.

8 MR. FOREMAN: Good morning, Your Honor. Michael
9 Foreman of Dorsey & Whitney for U.S. National Bank, National
10 Association, cash management bank of the debtors and lender
11 under three facilities.

12 MS. VRIS: Good morning, Your Honor. Jane Vris,
13 Vinson & Elkins for Ivanhoe Capital, a secured lender in this
14 case.

15 MR. ROSEN: Good morning, Your Honor. Sanford Rosen,
16 Sanford Rosen & Associates for FMR Funding Company, a property
17 lender.

18 THE COURT: Good morning.

19 MR. LEWIS: Good morning, Your Honor. Kenneth Lewis,
20 Teitelbaum & Baskin, attorneys for H&M Hennes & Mauritz, L.P.

21 THE COURT: Lenders?

22 MR. LEWIS: No. We are a tenant in about twenty-five
23 locations, Your Honor.

24 THE COURT: You are --

25 MR. LEWIS: A tenant.

1 THE COURT: A tenant?

2 MR. LEWIS: All right.

3 THE COURT: I think you're the first tenant who has
4 appeared that I can recall. Yes, sir?

5 MR. VASSER: Good morning, Your Honor. Shmuel
6 Vasser, Dechert LLP for mortgage lenders to three malls, Maine
7 Mall, Ala Moana and Tysons Galleria.

8 MR. ABEL: Good morning, Your Honor. Ira Abel, Cohen
9 Tauber Spievack Wagner for Howard S. Wright Constructors.
10 We're a mechanics of properly perfected mechanic's lien of a
11 shell property in Elk Grove, California.

12 MR. MEYERS: Good morning, Your Honor. Todd Meyers
13 with Kilpatrick Stockton. We're counsel to a number of lenders
14 whose loans are being serviced by ING Clarion.

15 MR. SELBST: Good afternoon, Your Honor. Stephen
16 Selbst, Herrick Feinstein for Citicorp Foundation for the
17 Oakwood Shopping Center lenders.

18 MR. TICOLL: Good morning, Your Honor. Gary Ticoll
19 of Greenberg Traurig of behalf of MetLife, who is a first lien
20 property lender, and also -- in addition, we represent two
21 lenders -- property lenders.

22 MR. SILVERSCHOTZ: Your Honor, good morning. Mark
23 Silverschotz, Reed Smith LLP, on behalf of Northwestern Mutual
24 Life Insurance which is a property lender on two facilities.

25 MR. ROSENBERG: Good morning, Your Honor. Robert

1 Rosenberg and Noreen Kelly-Najah of Latham & Watkins on behalf
2 of Deutschebank as agents and secured lenders to Fashion Show
3 and Palazzo.

4 MR. HAHN: Good morning, Your Honor. Richard Hahn of
5 Debevoise & Plimpton on behalf of New York Life, a property
6 level lender.

7 MR. METH: Good morning, Your Honor. Richard M.
8 Meth, Day Pitney LLP, appearing on behalf of A&K Endowment,
9 Inc., a holder with regard to the Summerlin Business Entity and
10 Summerlin Development.

11 MR. BERGER: Judge, Neil Berger, Togut, Segal &
12 Segal, for Macys, a tenant.

13 MR. STEIN: Grant Stein, Your Honor, Alston & Bird,
14 on behalf of Prudential Insurance Company of America, property
15 lender, also a mezzanine.

16 THE COURT: Anyone else in the courtroom?

17 MR. ROWE: Good morning, Your Honor. George Rowe for
18 General Trust Company.

19 THE COURT: A property lender?

20 MR. ROWE: No. Equity, Your Honor.

21 THE COURT: All right.

22 MR. FORTE: Joseph Forte of Alston & Bird
23 representing the CMSA and the MBA Amici.

24 THE COURT: Anyone else? All right. On the
25 telephone, please. Anyone on the phone wish to appear today?

1 Is the phone line open?

2 THE OPERATOR: Yes, Your Honor.

3 THE COURT: It is?

4 MR. ELKINS: Good morning, Your Honor. This is David
5 Elkins and I'm here on behalf of myself as a beneficiary under
6 a deferred payment contract involving some undeveloped land in
7 Nevada. Thank you.

8 THE COURT: Anyone else on the phone? All right.
9 Ms. Goldstein, where shall we start today?

10 MS. GOLDSTEIN: Thank you, Your Honor. We're here on
11 the continued hearing with respect to the debtors' motions to
12 use cash collateral, to approve DIP financing and to approve
13 the continuation of the debtors' cash management system.

14 Your Honor, this morning, we are presenting a revised
15 debtor-in-possession loan with a different lender than we had
16 filed prior to the prior hearing. The new lenders are a group
17 of institutional lenders to the corporate debtors and they are
18 led, generally, by Farallon. Your Honor, we filed this new
19 loan agreement along with a new proposed order with the
20 permission of the Court, at approximately 1 p.m. yesterday.
21 There has since been, based upon discussions over the last
22 twenty-four hours primarily with the representatives of the
23 informal secured creditor group, additional change to the order
24 and corresponding changes in the credit agreement. And we have
25 blacklines available or we'll shortly have blacklines available

1 for everyone in the courtroom. And later in the hearing, my
2 partner, Gary Holtzer, who stayed up later than I did last
3 night, will review the blackline with the Court.

4 THE COURT: Does that make him better able to --
5 perhaps he's more familiar with it but --

6 MS. GOLDSTEIN: Well, that makes him more familiar
7 with the intricacies of that blackline.

8 THE COURT: -- it may be more blurry. That was my
9 thought. But all right.

10 MS. GOLDSTEIN: Okay. So --

11 THE COURT: Everyone then will -- you'll give a
12 complete analysis of any differences between the blackline as
13 filed and the document that you're presenting today.

14 MS. GOLDSTEIN: Yes, Your Honor.

15 THE COURT: All right.

16 MS. GOLDSTEIN: And we will do that later. I think
17 the two most significant changes from the loan that we had
18 previously brought to this Court last week are the elimination
19 of any warrant and the elimination of second liens and
20 guarantied claims against property level and mez level
21 borrowers. As Your Honor is aware, the first was a big issue
22 for the unsecured creditors and the second a big issue for the
23 secured creditors.

24 The DIP loan that we are seeking approval of today
25 was selected by the debtor following a process that was

1 developed and engaged in on a fully collaborative basis with
2 the creditors' committee and which was participated in by
3 representatives of the unofficial secured lender group.

4 With a court reporter present at our offices Monday
5 afternoon, there was a full description of the process that
6 would be undertaken with respect to evaluation of bids by the
7 prospective DIP lenders. That process was explained to all of
8 the bidders at the same time. None had any questions or
9 comments and proceeded with the process.

10 Late in the evening, the winner, the Farallon group
11 was selected. And this was with the concurrence of the
12 creditors' committee and the secured lenders. We want to thank
13 all the parties who participated in that process and spent a
14 lot of hours to help us get here this morning and, frankly, who
15 spent many hours since then trying to resolve all possible
16 issues that could come up with respect to the DIP financing. I
17 can't tell you that we've resolved every single issue, Your
18 Honor, but we are pleased that certainly all objections of the
19 unsecured creditors' committee have been resolved. And after
20 the efforts of the unofficial group of secured lenders over the
21 last twenty-four hours and even during the process, we think
22 we've resolved almost all of the objections that had been
23 asserted by the secured lenders. As an aside, Your Honor, we
24 also have resolved the objections of the secured lenders to the
25 tenant obligations form of order. We had dealt with the tenant

1 obligations motion at the last hearing and we will be ready to
2 present a consensual order on that today.

3 Your Honor, now so what is left in terms of
4 objections, we believe that at the appropriate time in the
5 hearing, Deutschebank will speak as to its continuing objection
6 with respect to certain aspects of the debtors' cash management
7 motion. We're also not sure if there are other secured lenders
8 or mez lenders who may not have participated in the
9 coordinating group who may still have objections. So,
10 obviously, we may hear from representatives of those lenders
11 later in the hearing.

12 I thought it would be appropriate at this time to
13 review highlights of the DIP loan that we are seeking approval
14 of. And then we would proceed with making -- or continuing our
15 case through testimony.

16 Your Honor, we are seeking approval of a 400 million
17 dollar DIP financing which has a twenty-four month term. And
18 the borrowers -- we don't have our organizational poster up
19 here -- are GGPI and GGPLP. And the guarantors are debtors
20 other than the owners of property level and other than
21 mezzanine financing borrowers. And so, therefore, the
22 obligors, when we talk about obligors on the DIP loan, are the
23 two borrowers that I identified as well as a much more narrow
24 list of guarantors.

25 The collateral is a grant by the obligors only. So

1 we have no second lien collateral in connection with this DIP
2 financing. There will be -- the nonobligors will be the
3 subject to a negative pledge that is also required by the DIP
4 lender.

5 The interest rate will be LIBOR plus twelve percent
6 with a LIBOR floor of 1.5 percent. There's only one additional
7 fee, a 3.75 percent exit fee.

8 There will be an administrative agent fee of 30,000
9 dollars per month which, unless it's changed, will be paid for
10 the year in advance. The loan may be assigned by the lenders
11 to eligible assignees and the debtors and the lending group
12 have agreed on the requirements for an eligible assignee and
13 have agreed on the list of assignees that would not be
14 acceptable to either.

15 Voting in connection with the DIP loan would be by
16 majority lender vote, more than fifty percent of the aggregate
17 loans or commitments. There will continue to be a feature
18 important to the debtors, the debtors' option to convert any
19 outstanding amounts under the DIP loan to equity. This is
20 purely an option by the debtor. There's no forced conversion
21 of the DIP loan and that can be converted up to a maximum of
22 eight percent of the fully diluted equity.

23 Your Honor, I think that from the standpoint of the
24 at least high level provisions of this DIP loan -- obviously,
25 it's a very long document. I believe those are the provisions

1 that most questions would be asked about. Obviously, we can go
2 over and will go over the blackline later in the hearing after
3 we have gone through the testimony.

4 At this point, we'd like to move forward with the
5 testimony. At the last hearing on Friday, we offered the
6 testimony of Mr. Mesterharm in support of the three motions
7 before the Court. And what I would like to suggest is that we
8 reserve Mr. Mesterharm until later in the hearing after Mr.
9 Holtzer goes through the blackline because we do believe that
10 covers a number of points that were of concern to the secured
11 lenders. And if there's still a need for cross-examination of
12 Mr. Mesterharm, or further testimony, we would like to be able
13 to return him to the witness stand, if necessary at that time.

14 We would like to go forward today with the testimony
15 of Mr. Buckfire. He's here and we would like to offer him as a
16 witness as to the debtors' efforts to obtain DIP financing and
17 the process that resulted in the DIP loan before the Court
18 today.

19 We have available, Your Honor, Mr. Latella from
20 Cushman who is here if there is a need for testimony on the
21 appraisal of the so-called Goldman assets. At this point, Your
22 Honor, we do not -- or are not aware of anyone who is raising
23 an objection to the admission of that appraised amount through
24 the testimony of Mr. Mesterharm at the last hearing. But, as I
25 said, Mr. Latella is here today if such testimony would be

1 required.

2 Given that we are not quite certain what objections
3 will still be asserted today, we reserve the opportunity to
4 come back and respond to those. But I would like to have my
5 partner, Melanie Gray, proceed with the testimony of Mr.
6 Buckfire.

7 THE COURT: Well, shouldn't we have -- oh, I see your
8 colleague is not in his chair. Shouldn't we first go through
9 the changes to the DIP, if we can? Well, presumably he'll be
10 back.

11 MS. GOLDSTEIN: Maybe he went out to see what the
12 status of the blackline was, Your Honor.

13 THE COURT: Do you want to take care of the tenant
14 improvement order and --

15 MS. GOLDSTEIN: That's my same colleague, Your Honor.

16 THE COURT: He's going to do that as well. All
17 right.

18 MS. GOLDSTEIN: Give me a moment.

19 THE COURT: Okay.

20 (Pause)

21 MS. GOLDSTEIN: I see him at the door, Your Honor.

22 THE COURT: Mr. Holtzer, are you ready to go through
23 the material changes to the DIP at this time? I gather you're
24 waiting for copies to get down to the court, is that correct?

25 MR. HOLTZER: Yes, Your Honor, we are.

1 THE COURT: And do you want to wait before going
2 through the changes?

3 MR. HOLTZER: I think it may make sense to do that,
4 Your Honor. I'm happy to go through it at a high level now
5 with Your Honor if you want. I think many of the parties will
6 understand it but it may make more sense to wait for --

7 THE COURT: Well, I think we probably should do it
8 once. Everyone is concerned -- unless there were issues that
9 you can identify that we can take up separately. We can do
10 that. If you call Mr. Buckfire, it's merely to put him on for
11 certain purposes. I assure all parties who want to question
12 Mr. Mesterharm they'll have an opportunity to do so insofar as
13 it is relevant to the matters before us today. Obviously, if
14 there are other issues that parties have as we go forward in
15 these cases, there will be other opportunities both for
16 examination in court and for examination out of court or,
17 perhaps even better, for analysis and for meetings out of court
18 so that parties can understand. If you want to put Mr.
19 Buckfire, if that's the most efficient way of proceeding, you
20 may. I'll hear anybody who wishes to proceed in another
21 fashion and feels that their interests are being adversely
22 affected.

23 MS. GOLDSTEIN: Your Honor, Mr. Holtzer informs me
24 that our documents have arrived.

25 THE COURT: All right.

1 MS. GOLDSTEIN: So rather than debate whether Mr.
2 Buckfire's testimony should go forward first, I think we should
3 just go through the documents.

4 THE COURT: All right. And since you mention Mr.
5 Buckfire, I want to disclose that Mr. Buckfire and I are and
6 will be for the next couple of weeks members of a board of
7 trustees of a small private school that my sons attended many
8 years ago. And I think he's rotating off of the board in a few
9 weeks so I don't know that we'll even attend another meeting
10 together. But I make that disclosure so that parties can
11 consider whether they feel there is an appearance of bias or
12 impropriety. I don't believe there is one but if anybody feels
13 differently they can certainly let the Court know by letter but
14 should do so very promptly.

15 MS. GRAY: Your Honor, Melanie Gray with Weil
16 Gotshal. I just wanted to inform the Court that Mr. Buckfire
17 resigned from that board on April 16th which was the date that
18 these Chapter 11 cases were fired -- I'm sorry -- were filed.

19 THE COURT: Were fired?

20 MS. GRAY: So he's no longer a trustee on that board.

21 THE COURT: All right.

22 MR. HOLTZER: Okay, Your Honor. Gary Holtzer, Weil
23 Gotshal & Manges for General Growth. Your Honor, if I may
24 approach, I want to make sure you're looking at the same thing
25 that everyone else is.

1 THE COURT: All right. Does everyone have a copy of
2 the document --

3 (Pause)

4 MR. HOLTZER: Your Honor, I apologize. We may have
5 passed out the prior blackline. So we may have to take a
6 moment and fix that.

7 THE COURT: Take your time. Do you want me to take a
8 brief recess?

9 MR. HOLTZER: I think that probably makes sense, Your
10 Honor.

11 THE COURT: All right. I'll take a brief recess.
12 Now -- so the final order that you've given me, Mr. Holtzer, is
13 that the right document or not?

14 MR. HOLTZER: Yes, Your Honor. The final order is
15 the correct document. The --

16 THE COURT: And it's blacklined against which
17 document?

18 MR. HOLTZER: It's blacklined against the filed
19 version.

20 THE COURT: The version that was filed yesterday?

21 MR. HOLTZER: Yes, Your Honor.

22 THE COURT: All right.

23 MR. HOLTZER: Your Honor?

24 THE COURT: Yes?

25 MR. HOLTZER: We'll have to make sure that's the

1 correct order also. Give us a few moments.

2 THE COURT: Take your time. I'll be next door.

3 (Recess from 11:50 a.m. until 12:29 p.m.)

4 THE COURT: Please be seated. Be seated.

5 MR. HOLTZER: Thank you, Your Honor. We're very
6 sorry for the delay. We have --

7 THE COURT: No. That's fine.

8 MR. HOLTZER: -- passed out changed pages from the
9 credit agreement that we filed with the Court on Tuesday which
10 show the changes from the DIP credit agreement for the Farallon
11 Group as compared to what we're presenting today.

12 In addition, Your Honor, as you might expect, there
13 have been some continuing discussions and additional changes
14 that aren't in the blackline which we'll describe for Your
15 Honor on the record. I'm sure we have plenty of eyes on the
16 document and there may be additional comments or thoughts that
17 we will have to continue to work through the document as we go
18 forward now. But I'm going to start now to go through the
19 changes pages in the credit agreement.

20 Your Honor, the first one is simply including in
21 Section 1.1, the definition of "cash management order". And,
22 in fact, many of these changes are changes that developed
23 through discussions that the company had yesterday with
24 coordinating counsel for the property lenders as well as the
25 DIP lender. And that is what is resulting in some of these

1 changes to satisfy concerns that coordinating counsel for the
2 property lenders had taken in if they had discussions with many
3 of the property lenders on calls that they were working
4 through. And so, the first one again, Your Honor, is just
5 inclusion of the definition of "cash management order".

6 Secondly, Your Honor, in Section 4.1(a), the secured
7 pre-petition wage lenders expressed some concern that the
8 adequate protection payments would cease upon an acceleration
9 of the DIP. We have added language so that it is clear that we
10 specify that the funds in the main operating account that are
11 not the subject of the agent's first liens may only be used
12 during an even of default for adequate protection obligations.
13 And I think that was the concern that was raised. So we have
14 added language to satisfy that point.

15 And, again, at each of these points, I'm confident
16 that coordinating counsel will step up to clarify anything that
17 we don't get right.

18 The next one, Your Honor, is Section 4.1(d). That
19 one, Your Honor, we were asked to include specific definitions
20 for the tenant obligations order which we'll also be presenting
21 to Your Honor later today after having had similar discussions
22 with coordinating counsel for the secured property lenders to
23 resolve as many of the issues as we can with that order. They
24 asked that we use the defined term for the tenant obligations
25 order as well as a definition for a cash management order.

1 The next one, Your Honor, is in Section 6.11(b). The
2 secured pre-petition lenders expressed concern that 6.11(b) did
3 not allow for refinancing of prior lien debt because it
4 requires the negative pledged debtor to become a guarantor upon
5 discharge or repayment of the prior lien debt. And I think we
6 have added words so that refinancings are able to occur, which
7 was the principal comment made, as long as they're not adverse
8 to the lender. And that's our view about what we would be
9 doing in the future to address that point.

10 The next one, Your Honor, is 8.2(a). The secured
11 pre-petition lenders expressed a concern that the DIP loan may
12 create superpriority claims that purport to be superior to
13 their liens. We wanted to clarify, Your Honor, on the record
14 that there's no intention to make superpriority claims senior
15 to any liens. We would confirm that, as a matter of law, that
16 that really can't happen. So we didn't do anything in the
17 document. We promised we would clarify that on the record.

18 The next one, Your Honor, is 9.16. The secured pre-
19 petition lenders expressed a concern of the ability of the DIP
20 lenders to veto modifications to their mortgage loan
21 agreements. And we have placed a provision in or adjusted the
22 language, Your Honor, so that we permit modifications to those
23 documents that are not adverse to the term loan or the lenders.
24 And the DIP lender has agreed to that, of course.

25 The next one, Your Honor, is Section 11.2(d). The

1 pre-petition lenders expressed a concern that the DIP lender
2 might be able to apply all of the main operating account funds
3 to repayment of the DIP upon the occurrence of an event of
4 default and that that would vitiate the adequate protection
5 liens that they were getting in that account. We have added a
6 cross-reference to that section to clarify that their rights
7 with respect to the amounts in the main operating account are
8 subject to the adequate protections liens that we're giving to
9 the secured pre-petition lenders to satisfy that concern.

10 The next one, Your Honor, is at Section 11.2(e). The
11 secured pre-petition lenders expressed concern that the
12 adequate protection payments would cease upon an acceleration
13 of the DIP. We've added language to specify that the funds in
14 the main operating account that are not subject to the agent's
15 first liens, all right, may only be used during an event of
16 default for adequate protection obligations. So that that's
17 clear now.

18 The next one, Your Honor, is at Section 11.2(e). The
19 pre-petition lenders expressed concern that the DIP lender
20 might be able to disburse funds from the cash collateral
21 account to repay the DIP upon the occurrence of the event of
22 default. And that would, again, eliminate their entitlement to
23 have that first lien position on the cash. And so, we have
24 added the cross-reference there as well to make sure that the
25 adequate protection liens are in front of the DIP lenders'

1 entitlement to that cash out of the account.

2 Your Honor, what's not in the blackline are two
3 changes that we made this morning in response to other secured
4 lender comments that we had. And they are to the definition of
5 "negative pledge debtor" and "negative pledge properties". We
6 have clarified that it is not the intention of this loan
7 agreement to pick up properties securing or entities which are
8 part of the credit structure of the mez debt. Your Honor may
9 recall that there are both project level lenders and then above
10 them there are mez lenders that are structurally subordinated
11 from those project level lenders. And we added some language
12 to clarify that point.

13 The next one --

14 THE COURT: Those debtors are not either subject --
15 or they're not lenders or they're not subject to the DIP order?

16 MR. HOLTZER: They're not, Your Honor. Borrowers or
17 guarantors.

18 THE COURT: Borrowers or guarantors is the right
19 terminology.

20 MR. HOLTZER: That's correct, Your Honor.

21 THE COURT: All right.

22 MR. HOLTZER: The last point on the credit agreement,
23 Your Honor, is that we added language to confirm that mandatory
24 prepayment provisions don't pick up sales proceeds that would
25 go to the mez lender so that that's clear. It's consistent

1 with the prior comment we just made.

2 With that, Your Honor, I think we would have moved
3 through the credit agreement changes that we wanted to place on
4 the record. I'll just take a moment to make sure I haven't
5 missed any. Your Honor, with those changes on the record, and,
6 again, we have passed out those changed pages to the folks in
7 attendance here today, and we would not offer up any more in
8 respect of changes to the actual credit document itself.

9 THE COURT: All right. You want to go through the
10 changes to the DIP order?

11 MR. HOLTZER: Yes, Your Honor.

12 THE COURT: All right. Those, Your Honor, are a
13 little more extensive and the blackline that we have here in
14 court reflects blackline changes that we had made to the order
15 that we had filed on Tuesday. However, there continue to be
16 discussions in your caucus room this morning and those changes
17 we'll have to describe on the record for you as well. Those
18 changes were made to satisfy concerns that were raised by both
19 secured project level lenders as well as additional concerns
20 and adjustments from the DIP lender in response to some of
21 those changes.

22 Your Honor, the first change -- and it's a change
23 that occurs in a number of places and it's really a cleanup
24 change. We had used the term "obligor" as opposed to
25 "debtor" -- we used the term "debtor" as opposed to "obligor"

1 and we're having to change that. Part of that change, Your
2 Honor, is as a result of the improvement in the DIP loan
3 wherein we have removed the second lien and guaranties from the
4 project level lenders. And as a result, the uniformity of the
5 use of the word "debtor" no longer makes sense. We needed to
6 create another term to distinguish for purposes in the order.
7 And those changes are shown in the blackline. I believe that
8 the blackline that you have, Your Honor, is one in which the
9 DIP lender was still confirming that that change throughout was
10 acceptable to them. And we'll make sure before we finish that
11 they can confirm that, Your Honor, because it's on more than
12 one page. But it was all as a result of a benefit to the
13 secured property lenders as a result of taking the second lien
14 and the guaranty off of those project level entities.

15 MR. CROSS: We can confirm that we've gone through
16 the order and the changes from "debtor" to "obligor" is fine.

17 THE COURT: All right.

18 MR. HOLTZER: Your Honor, the first substantive
19 change that we'd like to note for the Court is on page 17.
20 It's actually on page 16 of the blackline, I apologize. It's
21 in the heading titled "Lien on Main Operating Account". We
22 have made an adjustment to the placement of the defined term
23 "main operating account" so that it includes any successor or
24 replacement account. A comment that was made by counsel for
25 the property level lenders was that they wanted to make sure

1 that monies could not be moved out of the main operating
2 account and thereby eliminate the benefit of their lien.

3 Your Honor, just so that we're clear, some of the
4 changes that are reflective of removing the second lien and
5 guaranty from the project level lenders are made at points.
6 And while they're what I would call cleanup, they are one of
7 the most substantive changes in the order because it
8 effectuates one of the main benefits that the property level
9 lenders were seeking to achieve in the negotiation.

10 The next change, Your Honor, is on page -- paragraph
11 6(c). It may be easier to do that in the blackline. Various
12 parties asked for clarification that the liens of the adequate
13 protection parties will attach to funds in the main operating
14 account that are moved out of the main operating account. And
15 we have added words that say "in such funds wherever
16 deposited".

17 Further down, in paragraph 16, Your Honor, another
18 concern raised by the secured pre-petition lenders was that the
19 adequate protection payments would cease upon an acceleration
20 of the DIP. We referred to that a few moments ago in our
21 changes in the credit agreement. There are parallel changes
22 here in the order.

23 Your Honor, the next change is in paragraph 8(a) of
24 the order. Your Honor, and this is one of the changes that is
25 shown in the order but there's been a subsequent adjustment

1 which we'll reference now. The issue that was raised which
2 caused the removal of the language shown in the blackline
3 toward the bottom of 8(a) was a concern that the secured pre-
4 petition lenders expressed whereby they were concerned that
5 this language would preclude them from access to their remedies
6 -- or, I'm sorry. This was -- they were concerned that the
7 adequate protection payments would cease upon acceleration of
8 the DIP. And they were also concerned that this language would
9 preclude them from accessing certain remedies while the
10 payments -- I need one moment, Your Honor.

11 (Pause)

12 MR. HOLTZER: Your Honor, this is -- the concern that
13 the DIP lenders had on this point is that they wanted the
14 property level lenders to have a silent second on what we call
15 the Goldman assets. And we had removed language which had
16 defeated that concern. And then further discussions with the
17 property lenders, we've reinserted that language. And so, the
18 first sentence which begins "So long as payment" will remain
19 out of the order. But the second sentence which begins
20 "Whether or not payments on account of the adequate protection
21 obligations are made", that sentence will remain in the order.
22 And the property level lenders have understood and agreed that
23 that is not their concern. But I'm happy to have them clarify
24 that one on the record.

25 MR. CROSS: Yeah. I was just going to confirm. No

1 objections.

2 THE COURT: All right. They are getting then a
3 silent second on the Goldman property?

4 MR. HOLTZER: Yes. And this language confirms that.

5 THE COURT: Jointly and severally, more or less?

6 MR. CROSS: More or less.

7 THE COURT: All right.

8 MR. HOLTZER: Yes, Your Honor. Your Honor, the next
9 change that we have is --

10 THE COURT: I suppose anybody who doesn't want it can
11 stand up and say they don't want it.

12 MR. CROSS: Your Honor, one of the clarifications --
13 and I also understood that in replace of the first sentence
14 here, we're working on language that provides for a mechanic
15 with regard to the adequate protection. And some language is
16 going into that to replace that first sentence. And we just
17 haven't come up with the language yet.

18 MR. HOLTZER: My partner, Mr. Youngman, may be
19 working on that. Give me a moment.

20 (Pause)

21 MR. HOLTZER: Your Honor, we'll have to come back to
22 that one and see where that one lands.

23 THE COURT: We can come back to that. All right.
24 One issue to come back to.

25 MR. HOLTZER: Yeah. The next one, Your Honor, is in

1 paragraph 13(a). This is a simple one, Your Honor. The
2 secured pre-petition lenders requested notice of an event of
3 default. So we have made that revision.

4 Similarly, in paragraph 17(h), the secured pre-
5 petition lenders have requested notice of amendments of the DIP
6 documents. We've made that change. At page 35, or paragraph
7 17(o) probably is a better cross-reference, the secured pre-
8 petition lenders have requested notice of an amendment of this
9 order since their adequate protection rights are contained in
10 this order. We've made that revision.

11 THE COURT: So we're now in --

12 MR. HOLTZER: 17 --

13 THE COURT: Right. I think in order to -- is it --
14 one second. In 17(h), where we were a moment ago, you give, in
15 the proviso at the end, the creditors' committee an objection
16 to an amendment to the order. I think you'd have to give that
17 right to any party. Where it says creditors' committee, just
18 consider whether it shouldn't be "or any party in interest
19 would have the right to object to an amendment becoming
20 effective without a court order".

21 MR. HOLTZER: Give me one moment, Your Honor. I
22 think there's a reason we distinguish --

23 (Pause)

24 MR. HOLTZER: I think, Your Honor, and we'll confirm
25 this with the committee as well, I believe the reason for

1 distinguishing is that the top group gets five business days to
2 object to material amendments. But I think the creditors'
3 committee wanted to see them all. But let us review the words
4 and we'll see if that makes sense.

5 THE COURT: All right.

6 MR. HOLTZER: We were trying not to give notice of
7 non-material ones to a huge population.

8 THE COURT: Well, I think that's certainly fair if
9 you just put them on the docket.

10 MR. HOLTZER: Yeah. We'll be filing them, Your
11 Honor, of course.

12 THE COURT: You can just file them. And I think we
13 need the words "or filed" in them. I'm just giving you these
14 small matters because we're in (o). And I think unless it's a
15 tremendous burden where under "Amendment of Order" in the last
16 line, it says "Notice of any amendment of the order shall be
17 provided to all parties entitled to receive notice." I think
18 you certainly can provide that notice. I gather it goes out by
19 email so it's not a burden. But I think it should be filed.
20 So I would add the words "filed on the docket and" at that
21 point.

22 MR. HOLTZER: Yes, Your Honor.

23 THE COURT: And I only mention it 'cause we're here
24 in (o) and these are not material changes. Anything else?

25 MR. HOLTZER: Yes. Two more. At paragraph 18 --

1 THE COURT: All right.

2 MR. HOLTZER: We have a language requested that we
3 clarify the language in 18. And that one was happening as we
4 were breaking. So let me just confirm where that is. Yes,
5 Your Honor. I think that objection to the language in the
6 blackline, I understood, has been withdrawn. And so the
7 blackline, as Ms. Vris has reviewed it for her client, is
8 acceptable now.

9 THE COURT: All right.

10 MR. HOLTZER: So we're past that one, Your Honor.
11 Finally, I think we've been asked to add provisions that
12 provide for reporting to mez lenders. And we'll be putting
13 that in the order as well.

14 THE COURT: All right. And I would just ask you to
15 add to the end of paragraph 19, which has to do with the
16 effectiveness order, if entered on subsequent filed cases,
17 words to the effect that "subject" -- and I would add something
18 like this: "subject to the right of any party in interest in
19 any such subsequent case to move within twenty days" -- or you
20 can propose another period -- "for an order restricting or
21 amending the effect of this order in such case and subject
22 further to the revision by such subsequent debtor with
23 appropriate notice in such subsequent case".

24 MR. HOLTZER: Okay.

25 THE COURT: Something to that effect. These are not

1 material. Now I can proceed in any -- we can proceed in any
2 number of different ways. We can -- yes?

3 MR. HOLTZER: Your Honor, there was one other point
4 we should mention. And I'll ask for Ms. Buell's indulgence for
5 a moment as counsel for Goldman, and Ms. Goldstein. We had,
6 immediately prior to this hearing commencing, a few open issues
7 with respect to the Goldman situation. And I think that we've
8 resolved --

9 THE COURT: Such as the payoff letter, I gather.

10 MR. HOLTZER: Such as the payoff letter, Your Honor.
11 And I think that we have resolved them. Ms. Goldstein, do you
12 want to put that one on the record since that one's yours?

13 MS. GOLDSTEIN: Thank you, Your Honor. We apologize
14 for this back and forth but a lot of things were going on this
15 morning.

16 THE COURT: No, no. Nothing to apologize for.

17 MS. GOLDSTEIN: The one issue that needed to be
18 resolved under the payoff letter was a continuing indemnity for
19 Goldman Sachs. The order provides that the creditors'
20 committee has a period in which to investigate the liens of
21 Goldman Sachs. Their documents provided for indemnification
22 which Goldman asserted covered such costs. What we have agreed
23 so that the payoff could go forward is that there would be a
24 carve-out from the DIP loan for fees incurred by Goldman in
25 connection with such investigation for up to one million

1 dollars. Your Honor, we hope that the investigation goes
2 quickly so that that is not the case. But there will be a
3 carve-out for that indemnity. The debtors agree that to the
4 extent the costs of Goldman defending any claim -- and, by the
5 way, it would have to a successful claim -- I mean, a
6 successful defense --

7 THE COURT: I understand that and --

8 MS. GOLDSTEIN: -- because if the committee under any
9 circumstance --

10 THE COURT: I'm going to assume that the million
11 dollar figure is the result of grave concern and not a serious
12 anticipation that it would cost that much to respond to the
13 committee's --

14 MS. GOLDSTEIN: No. Your Honor, in fact --

15 THE COURT: -- inquiries. However, I'll leave it at
16 that.

17 MS. GOLDSTEIN: Yeah. I mean, Your Honor, again, if
18 the liens were proved to be not perfected and they were
19 unsecured, obviously, then the indemnity would not be secured.
20 So -- and that would go away. But on the assumption, Your
21 Honor, that this is a potential secured claim, there is a
22 carve-out of up to a million dollars. The debtors agreed that
23 there would also be an administrative claim for amounts beyond
24 that up to another million dollars subordinate to the DIP lien
25 and DIP administrative expense claim. And anything else is

1 just unsecured.

2 Now, the facts are, Your Honor, that the debtor will
3 provide the documents that the committee needs to review.
4 We're hoping that this is a de minimis issue but the debtor,
5 the committee and Goldman Sachs were satisfied with that
6 approach as well as the DIP lender.

7 MS. BUELL: Sorry, Your Honor. Ms. Goldstein --

8 THE COURT: Why don't you come to the microphone so
9 that those in the -- on the telephone and others can hear you.

10 MS. BUELL: Yes, Your Honor. Deborah Buell of
11 Clearly Gottlieb on behalf of Goldman Sachs Mortgage Company.
12 Ms. Goldstein has accurately described the resolution that we
13 have come to. And obviously, the carve-out and the admin claim
14 is a very protective type of provision in the event that we go
15 beyond an inquiry, we actually have litigation. We obviously
16 expect this to be hypothetical rather than actual and to do
17 whatever we can to respond to the inquiry and to wrap it up.

18 THE COURT: All right. Thank you.

19 MR. HOLTZER: Your Honor, two other items that
20 counsel for the pre-petition lenders reminds me about. One is
21 they would like some language added that in the event that the
22 debtors are not going to be in compliance, or aren't in
23 compliance, I should say, with this order, they would like
24 notice of that.

25 MR. CROSS: That's right. And we'd like the

1 opportunity to come in on an expedited basis to enforce the
2 cash collateral order.

3 THE COURT: You always have that. I think you have
4 that right throughout the case if there's cause.

5 MR. CROSS: That's better than the order. Thank you.

6 THE COURT: And we can certainly -- it's certainly
7 appropriate to put language in the order but I expect to be
8 open for business for longer than this case will be pending.

9 MR. HOLTZER: Secondly and finally, Your Honor, in
10 paragraph number 6, there's some blackline language that we
11 added and that I referred to a few minutes ago wherein we
12 confirmed that during an event of default or an acceleration of
13 the obligations that we would continue to use cash collateral
14 and make the adequate protection payments in accordance with
15 this order. Counsel wanted us to confirm that that includes
16 paying the expenses of the property. That's your comment?

17 MR. CROSS: Your Honor, there's a concern that's been
18 expressed by some of the lenders that the words "that is
19 subject to the liens of the adequate protection parties" in
20 some way limits the ability of the upstreamed rent to come back
21 down and pay operating expenses because adequate protection is
22 the diminution concept. I believe the intent of this language
23 is that if rents are upstreamed that rents could come back down
24 to pay operating expenses even if the DIP's been accelerated.
25 And that's what we're seeking to clarify in that discussion.

1 MR. HOLTZER: And the answer is, Your Honor, that's
2 absolutely correct.

3 THE COURT: All right. Thank you.

4 MR. HOLTZER: With that, Your Honor, that
5 incorporates the changes to both the credit agreement and the
6 order.

7 THE COURT: All right. How do you suggest we proceed
8 from this point?

9 MR. HOLTZER: Your Honor, we would call Mr. Buckfire
10 to the stand to complete his testimony.

11 THE COURT: All right. You want to complete the
12 record then we can take a brief break and then I can hear from
13 any party with continuing objections or concerns. And anyone
14 who wishes to examine either Mr. Mesterharm or Mr. Buckfire
15 will have an opportunity if they wish. Or, they should,
16 perhaps during the break, discuss with the debtors procedures
17 whereby the individual concerns can be brought in due course
18 before the Court and be heard without necessarily precluding
19 the entry of a corporate cash collateral order which, as I've
20 said many times, can be amended for cause shown on notice at
21 any time during a case. And the DIP order -- now the DIP order
22 may well impinge on various issues and may impinge on the cash
23 collateral order. But I'm not so sure it does any longer in a
24 material way.

25 So I think those are matters. I don't want to keep

1 fifty or seventy-five lawyers tied up today for concerns that
2 are unique to individual property holders. On the other hand,
3 everyone has their right to cross-examine on this record if
4 they want to. I would be grateful -- and I think it's to
5 everybody's advantage that we try to create some procedures in
6 this case that makes sense. So individual property lenders'
7 interests can be considered separately. Those who wish to
8 proceed with certain motions or certain concerns will certainly
9 have an opportunity to do so. The more people we keep here
10 today, the more cost it's going to be for the debtor as a whole
11 because I assume at least everybody who claims to be
12 oversecured, and that's almost everyone, is going to want to
13 add their legal fees to the value of the collateral. So I
14 think it's in everybody's interest that we keep legal fees
15 down. You just heard -- we certainly don't want to keep
16 Goldman's lawyers in the room any more than we possibly can.

17 MS. BUELL: Thank you, Your Honor.

18 THE COURT: But I can't tell Ms. Buell to go home and
19 not to stay for the end of this. Yes, sir? Did you have a
20 comment?

21 MR. CROSS: I was trying to be helpful. I think,
22 frankly, from a secured lenders' perspective, we've resolved
23 ninety-eight percent of it. And if we were allowed, without
24 Mr. Buckfire's testimony to proceed with the ability to put
25 just a couple of things on the record, we could rapidly allow

1 many people in the courtroom to go.

2 THE COURT: That's certainly fine with me. Indeed,
3 if there's no objection -- and these are important matters. So
4 anyone can object. But if the parties want to proceed by way
5 of proffer with regard to Mr. Buckfire's testimony, I bet Mr.
6 Buckfire wouldn't object. And if there's no objection -- and
7 again, anyone who wishes, may object. However, the right to
8 cross-examine can be and will be reserved for another time and
9 another hearing, if necessary.

10 MR. HOLTZER: Your Honor, we can go forward and
11 proffer Mr. Buckfire's testimony and probably do that very
12 efficiently and quickly.

13 THE COURT: All right.

14 MR. HOLTZER: We can take counsel up on his offer
15 then thereafter to see whether or not in a short period of time
16 before the break we can give finality to many of the issues
17 that are filling up rows of seats here. I would also note,
18 Your Honor, in order to make that part efficient, we should
19 also go forward and explain to Your Honor the changes that
20 we've agreed to with the secured property coordination
21 committee and the unsecured creditors' committee on the tenant
22 obligations order that we have following the Court's grant of
23 that motion last time and the direction to circulate that order
24 and have discussions with all the parties.

25 So, Your Honor, Ms. Goldstein reminds me. It may be

1 even more efficient as well to see whether there is anyone who
2 is objecting to the relief we're seeking as compared to arguing
3 some legal points in the order which is what I think counsel
4 was referring to when he said that we could move through about
5 ninety-eight percent of this pretty quickly. So it may be
6 helpful to the process to find out --

7 THE COURT: All right.

8 MR. HOLTZER: -- whether or not there is anybody who,
9 in fact, is objecting to the relief.

10 THE COURT: Are there any objections -- what I would
11 call objections in principle? Yes, sir? Come forward.

12 MR. SELBST: Good afternoon, Your Honor. Stephen
13 Selbst, Herrick Feinstein, for Citicorp as the administrative
14 agent on the Oakwood property. Your Honor, my objection is
15 very simple. Citicorp has alleged that it is undersecured.
16 The debtors did not challenge that contention. And, Your
17 Honor, respectfully, we believe that we are differently
18 situated than all the other property lenders here. As Your
19 Honor is well aware, it's the debtor's burden to establish that
20 we're adequately protected. And at least in the testimony that
21 was adduced before Your Honor last week, there was no evidence
22 whatsoever that there is any kind of an equity cushion with
23 respect to that property.

24 Therefore, Your Honor, even though we recognize that
25 the debtors have made significant concessions on other issues,

1 we believe that we are uniquely harmed by the use of our cash
2 collateral and we're simply asking to be carved out of this
3 order on that basis, Your Honor.

4 THE COURT: By being carved out of this order, what
5 do you mean by that? Do I understand correctly that your
6 property is not being subjected to a second lien?

7 MR. SELBST: That's correct, Your Honor.

8 THE COURT: So what do you mean by being carved out
9 of this order? Do you want me to order the debtors not to pay
10 your client anything by way of adequate protection?

11 MR. SELBST: Of course not, Your Honor.

12 THE COURT: All right.

13 MR. SELBST: What I don't want is the --

14 THE COURT: But what is the diminution in the value
15 of your property that is result of the entry of the DIP order.
16 Put the cash collateral order aside.

17 MR. SELBST: The DIP order is not the issue, Your
18 Honor. Your Honor, I want to be very clear. I am not
19 objecting --

20 THE COURT: No, no. Thank you. I --

21 MR. SELBST: No, no. I'm not objecting to the DIP
22 order. I'm objecting to the usage of the cash collateral.

23 THE COURT: Use of cash collateral.

24 MR. SELBST: That's correct, Your Honor.

25 THE COURT: All right. And what would you propose?

1 MR. SELBST: As I suggested in my papers, the
2 traditional remedy is a sequestration of the rent and that all
3 of the rents in excess of the property operating expenses be
4 applied to my client's obligations.

5 THE COURT: All right. Would you like me to set down
6 for a separate hearing the question of the use of your cash
7 collateral and whether or not you are receiving adequate
8 protection as it's defined -- or as it's not defined in the
9 Bankruptcy Code but as it's understood --

10 MR. SELBST: As it is taught by the cases.

11 THE COURT: -- in the Bankruptcy Code and have a
12 separate hearing --

13 MR. SELBST: I'd be very happy with that, Your Honor.

14 THE COURT: -- on that issue?

15 MR. SELBST: I'd be very happy with that, Your Honor.

16 THE COURT: And, in the meantime, the debtors should
17 not, I assume, escrow any funds for the benefit of your client.

18 MR. SELBST: What do you mean by not escrow, Your
19 Honor?

20 THE COURT: Well, I gather that the funds will not be
21 upstream -- you don't want the funds to be upstreamed --

22 MR. SELBST: That's correct, Your Honor.

23 THE COURT: -- out of your --

24 MR. SELBST: That's correct.

25 THE COURT: -- out of your properties.

1 MR. SELBST: That's correct, Your Honor.

2 THE COURT: Right. Now before we proceed along
3 the --I'm not -- I'll hear from the debtors.

4 MR. SELBST: Of course, Your Honor.

5 THE COURT: But before we proceed along those lines,
6 let me ask you what, in Mr. Mesterharm's testimony, relied on
7 an equity cushion to justify the use of your client's cash
8 collateral?

9 MR. SELBST: Your Honor, the debtors generally
10 alleged that there were equity cushions in these properties.
11 We responded in our papers and we attached an affidavit from
12 our appraiser stating that we were undersecured.

13 In the debtors' omnibus reply, and I don't have the
14 citation of the paragraph, they said that Citicorp concedes
15 that they are undersecured. That, to me, suggests an admission
16 on their part that they're not challenging that assertion, Your
17 Honor. I was going to ask Mr. Mesterharm on cross-examination
18 whether, in fact, they had conducted any appraisal of the
19 property, whether they had any basis to challenge that. And as
20 I said at the outset, Your Honor, it's their burden to
21 establish that equity cushion owed and that adequate
22 protection. And that's the only basis on which I wanted to --
23 excuse me, Your Honor.

24 THE COURT: I was just trying to clarify that, as I
25 understand the record to date, it is their burden to establish

1 adequate protection.

2 MR. SELBST: Correct.

3 THE COURT: But I did not understand that as part of
4 that adequate protection package that they were relying on
5 their proof that there was an equity cushion in your case or in
6 anybody else's case, for that matter.

7 MR. SELBST: I think they did, Your Honor, allege in
8 their original papers that there was generally an equity
9 cushion. And for the reasons that I've suggested to you, I was
10 trying to distinguish the case of my client's loan because we
11 do believe we're differently situated, Your Honor.

12 THE COURT: All right.

13 MS. GOLDSTEIN: Your Honor, may I respond?

14 THE COURT: Yes. Well, why don't I hear anybody else
15 who has a general objection to either the DIP or the cash
16 collateral order or the tenant improvements order?

17 MR. ELKINS (TELEPHONICALLY): Your Honor, may I speak
18 to the Court?

19 THE COURT: I'll take parties on the telephone when
20 everyone in the room has finished.

21 MR. ELKINS: Thank you.

22 MR. HOLTZER: We might alleviate some of this as well
23 if the Court would make a finding that the findings it makes
24 today do not prejudice any of the parties with respect to a
25 dismissal motion that they may bring subsequently. I think

1 some people are concerned that findings in these orders may
2 prejudice their ability to be subsequent motions and that may
3 allow -- of any kind -- and that may allow many people not to
4 take the podium. If you can confine the findings for purposes
5 of this DIP loan and the cash collateral order.

6 THE COURT: All right.

7 MR. ROSENBERG: Good morning, Your Honor. Forgive me
8 if I simply didn't quite understand. But I wasn't clear on the
9 scope of what you were asking for right now. Deutschebank
10 continues to object to the use of cash collateral out of the
11 protection order --

12 THE COURT: Right.

13 MR. ROSENBERG: -- because of the unique
14 circumstances of Deutschebank. I don't believe that any
15 further cross-examination will be necessary if the parties --
16 if the debtor will stipulate to one point. But we do want to
17 make oral argument and I'd refer Your Honor to documents that
18 are being put into evidence.

19 THE COURT: All right. Tell me what the point is.
20 And I have a stipulation from you with respect to documents.

21 MR. ROSENBERG: Yes, you do, Your Honor. The point
22 is that the budget that was provided to us late last week
23 provides for the first time for -- I believe it was 3.9 million
24 dollars of overhead, headquarters, admin expenses that were not
25 part of the approved budgets until that moment. So my hope is

1 that the debtor will stipulate that arguments as to whether or
2 not those charges are appropriate can be made another day if
3 necessary at all.

4 THE COURT: In what context would that be made in?
5 That the case is being now administered generally?

6 MR. ROSENBERG: No, Your Honor. It would be made in
7 the context of this -- the estates in which I am interested
8 being overcharged for expenses that it (a) should not have been
9 hit with at all; or (b) are being double-hit with which,
10 frankly, is our present belief. Again, it's not an issue we
11 have to deal with today if the debtor is willing to reserve it
12 for some other time.

13 THE COURT: All right.

14 MR. CROSS: Your Honor, I was asked by a number of
15 people to put one general thing on. Maybe it helps you, maybe
16 it doesn't.

17 THE COURT: Go ahead. The other is that there are a
18 number of parties who do not feel compelled to address the
19 Court. They do not intend to withdraw their objections. They
20 understand that their objections will be overruled but they've
21 just as soon -- they do not, by not appearing at the podium,
22 want to say that they've waived their objections.

23 THE COURT: Well, I think we should hear from at
24 least one party what the continuing objection is. And if all
25 other parties have that objection, those parties don't have to

1 stand up to do anything more than say me, too. And we can do
2 this also after the break. But I want to know what the
3 parties' continuing objections are, first, to the DIP order
4 and, second, to cash collateral.

5 MR. CROSS: I think the parties are prepared to
6 address any specific language provisions or legal provisions in
7 those orders that I think was interpreted by some in the room
8 that you were inviting sort of broad-based objections to the
9 concept that went beyond just the language of these orders.
10 People who have specific objections intend to come up and
11 address those to the extent they still exist. There are not
12 very many of them as based upon my understanding.

13 But there are some people who are concerned that by
14 not approaching the podium to say --

15 THE COURT: By not approaching now, parties are
16 certainly not waiving their right to come up --

17 MR. CROSS: That's all I was asking --

18 THE COURT: -- after we take a break, particularly,
19 if the language that I hope the parties will be able to fine
20 tune during the break is deemed satisfactory. And as I've said
21 on any number of occasions in terms of use of cash collateral,
22 parties can seek further relief for cause shown at a later
23 stage in the case. But on the other hand, the DIP is fairly --
24 it's not necessarily forever but it's a order that affects the
25 lender and affects other parties and we have to deal with it.

1 You have a material on this, right?

2 MR. ABEL: A material --

3 THE COURT: You have a mechanic's lien holder?

4 MR. ABEL: Mechanic's lien, yes, Your Honor, properly
5 perfected on Elk Grove, California. It is a non-producing
6 property. I have a couple of probably very general and
7 hopefully very easily answered questions, basically on two
8 schedules. I believe these are to the DIP loan. One is
9 Schedule 8.18 and the other is to 8.19-1 and 8.19-2. And the
10 general questions are: for 8.18, it's defined on first lien
11 properties. It is not clear to me whether those are properties
12 in which a first lien exists -- at least a first lien exists on
13 a property or those of which the DIP lender is getting a first
14 lien. I'd like that simply clarified. I assume that will be
15 fairly easy. And then on the 8.19-1, this appears to be -- it
16 says "prior lien debt". I would consider a mechanic's lien to
17 be a prior lien debt. And I don't know why my particular
18 client is not listed on that lien, number one. And, number
19 two, in the DIP loan agreement, under that paragraph -- excuse
20 me -- again, it says the first lien --

21 THE COURT: What paragraph number?

22 MR. ABEL: This is of the -- I believe it's of the
23 DIP loan, Section 8.19. And this is of the one as of, I guess,
24 last night. I don't know. I haven't seen anything since then.

25 THE COURT: Why don't you discuss it with the

1 debtors?

2 MR. ABEL: Fine.

3 THE COURT: You now have two ques -- do you have a
4 third question?

5 MR. ABEL: My third question is can I see 8.19-2?
6 That's it.

7 THE COURT: You can't ask that of me.

8 MR. ABEL: No. I can't ask that of you.

9 THE COURT: Thank you.

10 MR. ABEL: I just wanted to find out if it said what
11 I thought it said. Thank you.

12 THE COURT: Anyone else?

13 MR. METH: May it please the Court, Your Honor.

14 Richard M. Meth, Day Pitney LLP, appearing on behalf of A&K
15 Endowment. I believe the position that we've said has been set
16 forth in the objection that we filed as well as that filed by
17 Mr. Elkins who I know wants to address the Court on the phone.

18 THE COURT: Well, you're here. Why don't you address
19 the Court? And --

20 MR. METH: No. His interests are separate and apart
21 and not my client.

22 THE COURT: All right.

23 MR. METH: He's not my client. But he has similar
24 interests.

25 THE COURT: Then explain to me your continuing

1 objection and what words in the proposed order adversely affect
2 your client's interest?

3 MR. METH: There are not specific words and that's
4 why -- much as Mr. Rosenberg addressed certain concerns, we do
5 not have any issues that we wish to address with Mr. Westerman
6 [sic] who is the debtor's expert from Alix.

7 Our concerns are really three-fold. Under the terms
8 of the CSA agreement, to which our client is a party, it was
9 initially a party to that agreement with Rouse which then was
10 acquired by General Growth. There are restrictions based upon
11 the fiduciary relationship that existed pursuant to the terms
12 of that agreement which preclude a number of things. One is
13 that no liens can be put on what is called the Summerlin --
14 either Business Entity or the Summerlin Development unless
15 those funds are to be used expressly for the improvement of
16 that property. That is one of a number of negative pledges set
17 forth in Section 4.05 of the CSA agreement. Another deals with
18 a reservation of rights with regard to any sale in excess of
19 500 acres of that Summerlin Development much less the sale of
20 any particular major component of that property. We believe,
21 Your Honor, that those would be reserved and could be reserved
22 in conjunction with any proposed sale, either of a 500 plus
23 acre parcel or in connection with a proposed sale of the
24 entirety of the Summerlin Development and would simply request
25 a reservation of rights in that regard. But we do have major

1 concerns based both on the fiduciary obligations that are set
2 forth in that CSA agreement as well as the restrictions that
3 are set forth with regard to the expenditure of funds and the
4 lien-ing of the property in that regard.

5 And hopefully, I'll be able to work out some kind of
6 reservation of rights language with counsel for the debtor
7 during the break.

8 THE COURT: You referred to three issues. You've
9 named two.

10 MR. METH: I believe those -- I meant two.

11 THE COURT: All right.

12 MR. METH: I think those are all for Your Honor.

13 THE COURT: All right. Anyone else? All right. On
14 the telephone? Anyone on the telephone?

15 MR. ELKINS (TELEPHONICALLY): This is David Elkins.

16 THE COURT: You just heard counsel mention several
17 concerns?

18 MR. ELKINS: I actually share some of those
19 concerns --

20 THE COURT: All right. Any --

21 MR. ELKINS: -- but I have others that I would like
22 to take two minutes to explain them to you.

23 THE COURT: No. You don't have to explain the same
24 concerns. Explain to me what other additional concerns you
25 have. Obviously, if you have something you must add to what

1 counsel has stated -- but I understand the two points.

2 MR. ELKINS: Our concerns, Your Honor, are that given
3 the fiduciary obligations that were agreed to by the company in
4 1996 and given the protections that were intended to be
5 forwarded by the overall structure and covenant of the role of
6 an agreement that we have an interest in the properties that
7 are covered by the agreement which clearly do -- and the
8 company, as I understand it, currently proposes through the DIP
9 to grant a first lien on those properties to secure the DIP
10 lenders. Our view is that that granting of a lien severely
11 impairs the interest we have in the properties. It's a direct
12 and obvious violation of fiduciary duties owed to us by the
13 company for its own benefit. They agree to subordinate their
14 interest in the property to ours and yet they're violating that
15 term. We would simply ask that the company either give us some
16 form of adequate protection or reject our contract.

17 THE COURT: All right. Thank you.

18 MR. ELKINS: Thank you.

19 THE COURT: Anyone else on the telephone? All right.
20 Ms. Goldstein or counsel do you wish to respond to any of these
21 concerns or shall we take a break and then see what can be
22 finalized?

23 MS. GOLDSTEIN: Your Honor, I would like to briefly
24 respond to Citibank's objection because we vigorously object to
25 any separate hearing regarding the Oakwood property.

1 I also would like to take a minute and point out that
2 the CSA agreement, which Mr. Elkins and counsel spoke about, is
3 an executory contract. They are not lenders on the property,
4 let alone secured lenders. Those properties are entirely
5 unencumbered. Whatever rights they have as parties to the
6 executory contract, they have. If we reject the contract
7 they'll have the rights, whatever they are, as a result of that
8 and that is not a matter for today's hearing.

9 On Citibank, we were very clear in our response that
10 we were not relying on an equity cushion for undersecured
11 creditors. In fact, we didn't rely on an equity cushion for
12 anybody, Your Honor. While we may believe that many of the
13 lenders are oversecured, we have not taken any position on the
14 value of any property, including the Citibank property. They
15 maintain they're undersecured and therefore we responded
16 accordingly. But we have not taken a position on the value of
17 their property or anyone else's property.

18 The adequate protection that we're offering to
19 Citibank is appropriate for an undersecured creditor. You can
20 use the cash collateral of an undersecured creditor as long as
21 they're adequately protected.

22 The properties, Your Honor, are cash flow positive.
23 The debtor sweeps or traditionally swept the cash, paid the
24 expenses of the property and prior to the petition paid
25 interest on the property. What we're proposing now is to make

1 an adequate protection payment on the property equal to the
2 amount of interest. Citibank asserts it's undersecured and so
3 we believe -- and obviously that could change if it turns out
4 their not but it should be applied to principal. And for every
5 dollar of rent, excess rent, the difference between the rents
6 swept and the amount that goes back to the property for the
7 adequate protection payment and to pay the expenses of the
8 property, that differential, is a claim held by that property
9 against the parent company. It's an administrative claim.
10 Citibank has a lien on that claim but also, more importantly,
11 Citibank has, just as the other secured lenders do, a first
12 lien on the cash that is held in the debtors' main account to
13 the extent of the diminution in value of the collateral.

14 And if that diminution is equal to the rent
15 differential, then that may be the case Your Honor. I don't
16 think that we know for sure that that is the full diminution.
17 But essentially, Your Honor, they have a lien for up to the
18 amount of the excess rents. And so sequestering the excess
19 rents is just another way to achieve what we've already
20 proposed. Not only that, Your Honor, but we've also proposed a
21 lien, a second lien, on the Goldman assets.

22 So, essentially, our proposed adequate protection is
23 of greater value to Citi Corp. than what their counsel is
24 asking for. Because if you carve them out they get no second
25 lien, no lien on the cash and the lien on the cash can be in an

1 amount up to the excess rent that they're looking to sequester.
2 So Your Honor, they are being treated no differently then any
3 other creditor with respect to the use of cash collateral.

4 Your Honor, let me just go back. They're being
5 treated the same other than the application of the adequate
6 protection payments, Your Honor. And let me note for the
7 record that since the interim order was entered we have made an
8 adequate protection payment and they have, nonetheless, in
9 violation of the order, continued to trap the cash. So they
10 have taken more than they're entitled to and in violation of
11 the court order and in our view in violation of the stay since
12 the beginning of the case.

13 So we do not believe there should be a separate
14 hearing. We think we have proposed a package that more than
15 adequately protects their interest in their collateral.

16 Your Honor, as to the other -- I think Mr. Rosenberg
17 said that Deutsche Bank would pursue it's objection. I don't
18 know if you want us to respond to that now. I know my partner,
19 Adam Strochak, was planning to deal with that later in the
20 hearing but I assumed that they will just go forward with their
21 arguments and will respond later.

22 THE COURT: All right. Unless they wish any further
23 response right now.

24 MR. ROSENBERG: We do not, Your Honor.

25 THE COURT: All right.

1 MR. ROSENBERG: We'll discuss with the debtor whether
2 they're willing to stipulate to reserve rights on the issue I
3 described. Other than that, we're fine going forward.

4 THE COURT: All right.

5 MR. STAMER: Your Honor, just very briefly. We
6 support the debtors' responses to the objections. And in
7 particular, we do not believe that a separate hearing for
8 Citibank is justified or appropriate under these circumstances,
9 again for the reasons identified by the debtors' counsel.
10 Thank you.

11 THE COURT: Thank you. All right. Do you want to,
12 before we take a break, proffer Mr. Buckfire's testimony or
13 shall we save that for later?

14 MS. GRAY: Your Honor, Melanie Gray of Weil Gotshal &
15 Manges. I'm happy to go ahead with the proffer.

16 THE COURT: All right.

17 MS. GRAY: It's relatively short and that way we can
18 move forward with regard to Mr. Buckfire's testimony and
19 further build the record for the hearing.

20 Your Honor, I offer, pursuant to Federal Rules of
21 Evidence 103(a)(2) and 611(a) as a proffer the following
22 testimony of Kenneth A. Buckfire, a managing director and
23 cofounder of Miller Buckfire LLC. Mr. Buckfire is present in
24 the courtroom, is thoroughly familiar with the debtors'
25 extensive process to secure DIP financing and the terms of the

1 new DIP loan that is before the Court today.

2 If Mr. Buckfire were called to testify in support of
3 the motion to approve the debtor-in-possession financing his
4 direct testimony would be as follows:

5 He is a managing director and cofounder of Miller
6 Buckfire, a private investment banking firm specializing in
7 strategic and financial advisory services and large scale
8 corporate restructurings and M&A transactions.

9 In addition to advising clients in a broad range of
10 industries and managing principal investments in distressed
11 companies. Mr. Buckfire has played a leading role in the
12 restructurings of several major companies, including real
13 estate, financing and restructuring transactions for Standard
14 Pacific Homes, Oakwood Homes, CRIIMI MAE and Walter Industries.

15 Mr. Buckfire has extensive debtor-in-possession
16 financing experience as well, having arranged, what until
17 recently was the largest DIP financing for Calpine help line in
18 the amount of 7.4 billion dollars.

19 Mr. Buckfire is knowledgeable regarding the current
20 market for DIP financing, which he would describe as extremely
21 difficult having essentially broken down in July of 2007.

22 Mr. Buckfire holds an MBA from Columbia University
23 and a bachelor's degree in economics and philosophy from the
24 University of Michigan.

25 Along with other members of Miller Buckfire's team,

1 Mr. Buckfire has been serving as the financial advisor to the
2 debtor since December 10, 2008. In this capacity he is
3 familiar with the debtors' business operations, financial
4 affairs, debt structure, projected cash flows, financial
5 projections and the comprehensive efforts to obtain the DIP
6 financing.

7 Mr. Buckfire would testify that as part of Miller
8 Buckfire's engagement it was assisting the company in arranging
9 forbearances with its creditors and attempting to arrange an
10 out-of-court restructuring process while also preparing for the
11 continuancy of a Chapter 11 filing as the company, in January,
12 believed that it was at risk of potentially running out of
13 liquidity in February.

14 Mr. Buckfire would testify that over the course of
15 the last several months the debtors have engaged in a broad,
16 active and aggressive marketing effort to secure DIP financing
17 on the most favorable terms available in the current market.
18 Beginning in January of 2009 Mr. Buckfire and Miller Buckfire
19 commenced a thorough process to solicit proposals for DIP
20 financings, seeking financings from a wide spectrum of
21 candidates including commercial banks, real estate investors,
22 hedge funds, certain of the debtors' existing lenders and other
23 parties with existing stakes in the company's capital
24 structure.

25 Mr. Buckfire would testify that of the more than

1 thirty institutions initially contacted, twelve expressed
2 interest and signed confidentiality agreements to gain access
3 to General Growth's information for due diligence purposes.
4 Parties subject to the confidentiality agreements received
5 access to the confidential information through a data room
6 including the company's consolidated budget and cash flows and
7 information about the assets that comprise the DIP collateral.

8 At the end of January, Miller Buckfire distributed a
9 request for a proposal to the parties subject to the
10 confidentiality agreement. And in response received proposals
11 from several potential lenders. Miller Buckfire, along with
12 the debtors and their professionals, engaged in lengthy and
13 difficult negotiations with one potential lender that merited
14 the most attention. However, after nearly two months of
15 intense negotiations they were unable to reach agreement on the
16 key terms potentially leaving these debtors without any source
17 of DIP financing.

18 Mr. Buckfire would testify that faced with the
19 possibility of a Chapter 11 filing without the necessary
20 liquidity cushion that the DIP financing provides; the debtors
21 received an unsolicited proposal from Pershing Square, one of
22 the initial parties who had previously indicated an interest in
23 providing DIP financing.

24 Discussions with Pershing Square led to a new
25 proposal for a DIP financing that provided several key

1 advantages as the debtors detailed in their cash management and
2 DIP financing motion that was filed on the first day of this
3 case.

4 Mr. Buckfire would testify that as of the
5 commencement date, the original Pershing DIP commitment was the
6 most favorable DIP available to the debtors at that time.
7 Since that time, however, the debtors have continued to engage
8 in nonstop efforts to improve upon the terms of the original
9 Pershing Square DIP loan, negotiating with numerous additional
10 parties as well as a continued dialogue with Pershing Square.

11 The debtors and Miller Buckfire remained engaged in
12 vigorous negotiations up through the May 8th hearing with
13 potential DIP lenders. Mr. Buckfire would testify that on May
14 5th the debtors selected the exchangeable noteholders' DIP loan
15 and filed the appropriate notice and documentation with this
16 Court the following day. Parallel negotiations with both the
17 noteholders and Pershing Square continued after this time and
18 resulted in yet a revised, more attractive DIP loan offered by
19 Pershing Square. On May 8th the debtors filed this revised
20 Pershing Square DIP loan with the Court.

21 Mr. Buckfire would testify that at the May 8th
22 hearing Your Honor instructed the debtors to collaborate with
23 all parties in interest to continue accepting proposals for a
24 final DIP loan. On Monday, May 11th, at the Court's
25 instruction, the debtors conducted a negotiation session at the

1 offices of Weil Gotshal & Manges to obtain the best terms
2 available from interested potential lenders. All interested
3 lenders were invited to attend and present their best and final
4 DIP proposals to the debtor, their advisors, the official
5 committee of unsecured creditors and its advisors as well as to
6 the secured property lenders in this case.

7 During the day, four DIP proposals were presented by
8 three interested DIP lenders. Participants in the bidding
9 process had ample opportunity to collaborate with the debtors,
10 the committee and the secured lenders participating who all
11 vocalized their issues regarding each of the proposals directly
12 to the DIP lenders. At the conclusion of this session and with
13 the support of the committee, the debtors ultimately selected
14 the revised noteholders DIP loan which is before the Court
15 today.

16 Mr. Buckfire would testify that the debtors sustained
17 efforts post-petition to obtain the most favorable DIP facility
18 available, has resulted in the noteholders DIP loan which does
19 offer the more attractive -- the most attractive terms
20 available then provided under the prior proposals and present
21 the best overall package that the debtors have received to
22 date.

23 Mr. Buckfire would testify that the key highlights
24 that distinguish the revised noteholder loan include 400
25 million dollars facility, interest rate at twelve percent plus

1 LIBOR with a LIBOR floor of 1.5 percent; a twenty-four month
2 term, a conversion feature of up to 400 million of equity or
3 debt at the company's or debtors' sole option capped at the
4 lender's -- and capped at the lender's receipt of eight percent
5 of the common stock distributed in connection with a plan of
6 reorganization.

7 This DIP does not contain any warrant and no
8 commitment fee. There is a 3.7 five percent exit fee as
9 opposed to the earlier four percent fee that was included in
10 the earlier DIP proposals, which is also convertible into
11 equity or debt at the debtors' option.

12 This DIP loan is secured by a first lien on the
13 properties currently securing the pre-petition Goldman bridge
14 loan in addition to other collateral as provided for in section
15 6.1 of the loan agreement.

16 The second liens on the encumbered property of the
17 debtors or capital stock of the debtors owning property, to the
18 extent that the capital stock secures the prior lien -- there
19 are no second liens -- I knew that didn't sound right coming
20 out the first time. There are no second liens on the
21 encumbered properties of the debtors or capital stock of
22 debtors owning properties to the extent that the capital stock
23 secures the prior lien debt. And it does provide a first lien
24 on cash collateral and the debtors' main consecration account
25 in favor of those pre-petition secured lenders that are

1 entitled to receive adequate protection as set forth in the
2 proposed order.

3 Mr. Buckfire would testify that the ability of the
4 debtors to continue to operate their business and reorganize
5 under Chapter 11 will be significantly enhanced by the
6 financing memorialized in the revised noteholders DIP credit
7 agreement.

8 Mr. Buckfire would testify that the debtors' option
9 to convert the DIP loan into equity or debt removes a
10 significant condition to a successful plan of reorganization.
11 Further, the debtors operations and chances of a successful
12 reorganization will be improved by the enhanced liquidity
13 provided by this DIP loan. The liquidity provided by the loan
14 will further give the debtors an enhanced ability to main and
15 selectively improve its properties through increased capital
16 spending and maintenance during the course as well as to
17 operate in the ordinary course of business.

18 Mr. Buckfire would further testify that throughout
19 this process the terms of the revised noteholders DIP loan, as
20 were the others, were vigorously negotiated at arm's length and
21 in good faith. And based upon his experience and understanding
22 of the current financing markets, the debtors could not have
23 obtained more favorable overall terms and certainly not on an
24 unsecured basis, secured only with junior liens or with a
25 superpriority claim.

1 THE COURT: All right.

2 MS. GRAY: And that, Your Honor, I offer as Mr.
3 Buckfire's testimony.

4 THE COURT: Very good. And I assume I have a proffer
5 as to good faith that there are no undisclosed side deals that
6 the lenders, as well as the debtors, have been acting at arm's
7 length and in good faith in all respects.

8 MS. GRAY: Absolutely, Your Honor. And -- but I will
9 point out, just with regard to the Goldman facility, the
10 debtors were able to negotiate a reduction in the exit fee for
11 that and that is reflected in the side letter but it results in
12 a several million dollar benefit to the estate.

13 THE COURT: Very good. Thank you. All right. I
14 think we should take a break now. So any further concerns with
15 regard to the documentation can be clarified; any further
16 issues can be isolated and then we'll come back. I'll hear
17 from the parties with regard to any remaining issues and to the
18 extent there are issues, I hope that I'll be in a position to
19 rule.

20 Anyone who needs -- strike that. Anybody who wishes
21 to examine Mr. Mesterharm or Mr. Buckfire certainly can do so.
22 I do think that it would be in everyone's interest to find a
23 way to reserve individual concerns for a later date but I
24 realize that with regard to the Citibank objection, as to
25 today, that may be timely to decide. The Citibank objection

1 and the objection with regard to the Summerland Properties.

2 As to the issues relating to mechanic's liens, my
3 understanding in this DIP and cash collateral order is that
4 pre-existing valid and enforceable liens of a non-consensual
5 nature, i.e. mechanic's liens and the like, were not being
6 affected.

7 UNIDENTIFIED SPEAKER: That's correct, Your Honor.

8 THE COURT: And that there is language in the order
9 to that effect.

10 MS. GOLDSTEIN: Your Honor?

11 THE COURT: Yes.

12 MS. GOLDSTEIN: I would point out that we will be
13 having to proceed, I believe, with Deutsche Bank objection as
14 well.

15 THE COURT: Oh, I didn't mean to exclude the Deutsche
16 Bank objection but I'd like to find out, after the break,
17 exactly what the objection is. It's to the cash management
18 order as it stands today, particularly?

19 MS. GOLDSTEIN: Your Honor, Mr. Rosenberg said the
20 cash collateral order, I had believed it was to the cash
21 management order but I guess we'll find out --

22 THE COURT: Or perhaps both.

23 MS. GOLDSTEIN: -- when they make oral argument.

24 THE COURT: Both. All right. Thank you.

25 UNIDENTIFIED ATTORNEY: Your Honor, what time do you

1 want us to get back?

2 THE COURT: Does 2:30 appear reasonable? Give
3 parties an opportunity to get back.

4 (Recess from 1:40 p.m. until 2:55 p.m.)

5 THE COURT: All right. We're back on the record in
6 General Growth Properties.

7 (Pause)

8 MR. HOLTZER: Good afternoon, Your Honor. Gary
9 Holtzer, Weil Gotshal & Manges for General Growth.

10 Your Honor, we've completed the testimony of Ken
11 Buckfire and we would propose that we go forward now, describe
12 on the record, the changes to the tenant obligation order that
13 has been circulated amongst the parties. And then, Your Honor,
14 we can turn to any objections that any of the parties have and
15 resolve them in whichever order Your Honor would like to
16 approach.

17 THE COURT: We can start in any order. If the tenant
18 obligations order has the fewest obligations let's do that one
19 first.

20 MR. HOLTZER: Your Honor, may I approach with a black
21 line?

22 THE COURT: Surely.

23 (Pause)

24 THE COURT: Pardon me; this is black lined against
25 which version?

1 MR. HOLTZER: This is black lined against the version
2 that was filed, Your Honor.

3 THE COURT: All right.

4 MR. HOLTZER: Your Honor, the tenant obligations
5 motion had, as a part of it now, language that we took from the
6 cash collateral adequate protection order that related to the
7 debtors' agreement as a part of the adequate protection package
8 to go ahead and honor certain provisions of the pre-petition
9 loan agreements governing the leasing of the debtors' space in
10 its malls. And we have included that now in the tenant
11 obligation order.

12 THE COURT: You're on page 5?

13 MR. HOLTZER: And that language is at page 5. And
14 the language, Your Honor, is language which makes clear that
15 what the debtors are doing is that they're going to comply with
16 a nondefault leasing covenant specified in the first mortgage
17 document as part of the adequate protection package.

18 In exchange for that, Your Honor, the debtors are
19 requesting that the lenders comply with their provisions
20 concerning necessary consents, including with respect to SNDAs.

21 During the course of discussions with the
22 coordinating counsel for the pre-petition secured lenders, we
23 included language as a result of one of their comments, which
24 is in paragraph -- which is on page 6 in the bottom paragraph.
25 The way that this document works and the way that we disclosed

1 last time is that certain of our loan agreements have SNDAs
2 attached. Others do not have SNDAs attached; SNDA is a
3 subordination nondisturbance agreement. And what we have done
4 is we've attached to this document the form of SNDA that we
5 would like to use in the event that the underlying loan
6 agreement does not have a form of SNDA attached. And all of
7 this is in connection with our commitment to comply with the
8 leasing covenants and the loan agreements. Which, as Your
9 Honor noted at the last hearing, we're not obligated to do but
10 we're going to do as part of the adequate protection package
11 that we're offering.

12 During the course of discussions with counsel for the
13 senior -- the pre-petition secured property lenders, they asked
14 if we would insert language, which we have, along the following
15 lines. It begins on page 6 and it's the second sentence. And
16 it says, "With respect to the form of SNDA attached as Exhibit
17 1, the debtors will discuss in good faith requests by any
18 adequate protection party to develop standardized modifications
19 for such adequate protection party provided that any such
20 standardized modifications shall not unreasonably delay or
21 impair the debtors' leasing activities." And we've included
22 that in response to a request by coordination counsel that we
23 at least consider and engage with any parties that don't have a
24 form attached to their loan agreements in an effort to try to
25 resolve that consensually. But if we can't we would like the

1 form that we have attached here to be the one we use in
2 connection with the offer to comply with the leasing provisions
3 as a part of the adequate protection package. And that's the
4 substance of this order.

5 I would note for the record, we have been asked by
6 several tenants whether or not the information that we note in
7 this order that will be going to the creditors committee will
8 ultimately be going to parties other than the advisors or
9 professionals for the committee. And we have said that we
10 would work with the committee to develop a subcommittee so that
11 there are actual members of the committee who are making
12 decisions concerning them.

13 MR. STAMER: That's correct, Your Honor.

14 THE COURT: All right.

15 MR. HOLTZER: And so with that, Your Honor, if there
16 are any other questions on this order, that's where we stand on
17 tenant obligations.

18 THE COURT: All right. Does anyone wish to be heard
19 on the tenant order?

20 MR. LEWIS: Good afternoon, Your Honor. Kenneth
21 Lewis, attorney for H&M Hennes & Mauritz LP.

22 While I've had some discussion with Mr. Holtzer with
23 respect to the language addressing the notice provisions. As
24 Your Honor is aware, looking at the black line, while the prior
25 form of final order that was annexed to the supplement provided

1 for notice of the satisfaction of certain pre-petition tenant
2 obligations as well as certain lease amendments would be
3 provided to committee counsel only. And it was to be done on a
4 confidential basis and also on a no-name basis.

5 I assume, through discussions with the committee,
6 that language has been changed to now provide that the notice
7 would be provided to committee counsel. The confidentiality
8 provisions were removed as was the no-name basis. I had asked
9 if it could then be more of a for professional eyes only
10 language. I am told that the committee has some issues as to
11 why that's in there. So certainly it's my preference, and we
12 can hear from the committee as to why we can't have
13 professional eyes only. If we can't have professional eyes
14 only, certainly my concern as to whatever this subcommittee
15 would be that in essence it would not be another tenant or a
16 competitor of H&M because certainly we don't want our
17 competitors to see what our lease provisions provide and I
18 certainly don't believe that the debtors would want to see or
19 permit other tenants to start comparing notes with respect to
20 what their leases may or may not provide.

21 I've also asked Mr. Holtzer to confirm and I believe
22 he's prepared to do so. And so the record is clear that the
23 individual proposed tenant obligation or amendments means an
24 obligation or amendment on an individual lease or location
25 basis as opposed to just an individual tenant basis.

1 THE COURT: All right.

2 MR. STAMER: Your Honor, just very briefly. Again,
3 for the record, Michael Stamer from Akin Gump Strauss Hauer &
4 Feld on behalf of the official committee.

5 Your Honor, the arrangement that we negotiated with
6 the debtors was never on a no names basis. It is a start off
7 as professional eyes only but my assumption is there will need
8 to be decisions that will have to be made and it is the
9 professional's view that that should involve members of the
10 committee.

11 Mr. Holtzer wanted me to specify, and of course we're
12 amenable to this, that that subcommittee that we create will
13 not have any tenants on it. And if there is another committee
14 member that for some reason should not be provided access to
15 this information, we'll talk to the company about it and work
16 through that issue. And if not -- if we have a disagreement,
17 as always, we are free to come to consult with Your Honor.

18 But we feel that the confidential nature of the
19 information that we're going to be discussing will be protected
20 fully through that procedure.

21 MR. HOLTZER: Your Honor, one other follow up.
22 Counsel asked that we confirm on the record that the thresholds
23 set in the document for notice are per tenant per location and
24 that's correct.

25 THE COURT: All right. Well, it seems to me that --

1 well, please, go ahead. Is it on the same issue?

2 MR. CROSS: It is on the same issue, Your Honor.

3 THE COURT: All right.

4 MR. CROSS: I think this might actually be more
5 controversial now than the DIP order. We been addressing
6 things ad hoc, I want to thank the Court for the extension that
7 it granted and gave us the opportunity to organize, as well as
8 thank the debtor and --

9 THE COURT: You don't have to thank me. I thank you
10 for the organization that has obviously moved things forward.

11 MR. CROSS: It made a big difference. And this order
12 is substantially improved because these things -- these
13 provisions were not in this order. There are two provisions of
14 the order I just want to address briefly.

15 First, the SDNA language is an accommodation and we
16 will work in good faith. I just want to underscore from a
17 client perspective rather than coordinating counsel, I think is
18 now my official title, that if we bring that request to the
19 Court it will be because it's very important to our clients.
20 In the rush of these papers they have not had a chance to
21 review the form SNDA and most of our mortgages do not have a
22 copy of them attached.

23 THE COURT: I know how much all parties enjoy coming
24 down here. I assume that if they do it's for an important
25 reason.

1 MR. CROSS: The significant that I raise in my hat as
2 coordinating counsel, is that there is significant concern
3 about the alteration rights being granted without seeking
4 lender consents, particularly if lender consent is required
5 under the loan agreements. It is correct that typically loan
6 covenants do not have to be complied with in bankruptcy. The
7 difference here would be it is a use of cash collateral. It
8 has been put into the cash collateral motion and typically that
9 kind of expenditure, at least with respect to major
10 alterations, would be something that would be subject to
11 approval.

12 We negotiated with, and there was give and take in
13 this order and some things you get and some things you do not.
14 The debtors' taken a firm position that they do not want to
15 change this. Many of the secured creditors would like to see
16 alterations equally be subject to lender approval and I would
17 suggest at least major alterations be subject to lender
18 approval. That would resolve many of the objections that you
19 might otherwise hear.

20 THE COURT: All right.

21 MR. LEWIS: Your Honor, Kenneth Lewis. Again, I
22 appreciate committee counsel's comments. And again, I would
23 just want the record to be clear that my rights are reserved
24 with respect to --

25 THE COURT: Your clients and the rights of lessee's

1 are reserved. Obviously they are very important to the
2 debtors' success in the future and I'm sure that all parties
3 will be sensitive to their concerns. I don't know that we can
4 go any further today.

5 MR. LEWIS: Great. Thank you very much, Your Honor.

6 THE COURT: Thank you.

7 MR. BERGER: Judge, Neil Berger, Togut Segal & Segal
8 for Macy's. My client has not had an opportunity to review the
9 SDNA. I'm certain I can turn it around and have comments, if
10 any, to debtors' counsel and committee within twenty-four hours
11 and I'd ask for that opportunity.

12 THE COURT: You had your opportunity, sir. As I said
13 to your predecessor, your interests are very important because
14 you're a customer, if you will. And I'm sure that parties will
15 be sensitive. And if you have interests and you have concerns,
16 I'm open for business.

17 MR. BERGER: Thank you, Judge.

18 MR. HOLTZER: Your Honor, one clarification on the
19 last point. Macy's is, of course, a tenant. The SNDA goes to
20 the lender side of the house, not the tenant side of the house
21 so -- just to make that clear. It really doesn't have anything
22 to do, really, with the Macy's side. It's really a lender
23 issue.

24 THE COURT: I assumed so. I didn't think that the
25 concern was limited just to SNDAs but I may have misunderstood.

1 In any event, we're here today and if there are any documents
2 that are not in your possession we should get those to you
3 immediately.

4 MR. HOLTZER: Your Honor, just a brief response in
5 connection to counsel's comments. First of all, it has been a
6 huge assistance coordinating amongst the various lenders and
7 that is truly what has moved this along efficiently. But with
8 respect to this particular order, counsel is correct, there has
9 been much give and take on what has gone into this order with
10 respect to the SNDA language and including the commitment work
11 in good faith. And the issue counsel is raising in one which
12 we discussed and we have decided that we would abide by and
13 comply with the specific leasing provisions but not the other
14 provisions, including the ones that counsel has mentioned.

15 So I just wanted to make that clear and that's where
16 we are on that. So thank you.

17 THE COURT: All right. Well, I continue to believe
18 that we don't necessarily solve every issue today and some
19 issues that may be of concern are simply reserved. We've
20 certainly made a lot of progress.

21 All right. Any other objections to the tenant
22 improvements order? Anyone wish to be heard? Yes?

23 MR. YUDELL: Kenneth Yudell of Aronauer Re & Yudell
24 on behalf of a group of lenders, property lenders that are
25 serviced by Center Line Servicing.

1 Just one brief point to supplement what Mr. Cross
2 said on the alterations provision, Your Honor. The relief that
3 was requested in the motion by the debtors was very, very
4 specific to continue their pre-petition practices with respect
5 to leasing. It wasn't until this order that this carve out
6 provision of alterations appeared.

7 And as Your Honor has stated, there are certain
8 issues that we may be able to handle on another day. And it
9 seems to me that since this relief with respect to alteration
10 rights wasn't included in their motion, perhaps it is something
11 that we can handle on another day.

12 MR. HOLTZER: Your Honor, again just so the record is
13 clear, we don't view the leasing provisions to include the
14 alteration ones. And if that's what counsel is attempting to
15 argue, we want the record to be clear that the alteration
16 provisions are not, of course, provisions that we're going to
17 comply with. We don't intend that and that's not, in our view,
18 what the leasing provisions are.

19 THE COURT: All right. Anyone else? All right. I
20 understood this order, initially, to have two goals. One was
21 to obtain court permission to continue the pre-petition
22 practices in the sense that some of those obligations might be
23 considered pre-petition obligations that would not be
24 necessarily appropriate to continue post-petition. No one has
25 argued that those obligations that were of possibly a pre-

1 petition nature should not be fulfilled despite the bankruptcy
2 filing.

3 The other part of this order now contains various
4 efforts to provide the interested lenders with a part of their
5 total adequate protection package. We'll come back in a few
6 moments to the question of what adequate protection means in
7 the bankruptcy context, but I believe it is a carefully
8 tailored provision that balances the needs of debtors against
9 the rights of secured creditors. And that in this context this
10 order, at this point in time in the cases, appropriately
11 balances the parties' interests. It does not preclude lenders
12 from attempting to protect what they believe to be their
13 interests vis-a-vis the debtors. But it does not hamstring the
14 debtors in attempting to administer these cases in a reasonable
15 fashion.

16 The most important provisions of the order, it would
17 seem to me on the basis of the record that I have, are the
18 provisions that the debtor -- in connection with which the
19 debtors have agreed to comply with the underlying loan
20 documents.

21 As for any additional concerns, there has been so
22 much progress made in this area that I certainly will not
23 assume that any issues can't be worked out. These are
24 principally business issues. If parties believe that the
25 debtors are proceeding outside the ordinary course of business,

1 which is a term that sometimes is admittedly difficult to
2 define, but if the parties believe that I will remain open for
3 business and I can certainly hear the parties. I don't think
4 anyone's rights are being unfairly dealt with today and I'll
5 approve the order.

6 All right. Where shall we go next? The DIP order?

7 MR. HOLTZER: Yes, Your Honor.

8 THE COURT: I don't know if I have any remaining
9 objections to the DIP order but perhaps I do.

10 (Pause)

11 THE COURT: If you want me to -- since DIP and cash
12 collateral orders are actually in the same, I can take them
13 together if you wish. But I do think -- I would appreciate
14 your distinguishing between the two because there is a cash
15 collateral component and then there is a DIP component. And
16 there's a panoply of protections given to the DIP.

17 MR. CROSS: Right. And I think what you're going to
18 find is I've got two corrections to put on the record that are
19 agreed to and some reservation of rights.

20 THE COURT: All right.

21 MR. CROSS: And I've tried to catalogue them but
22 everyone can speak for themselves, obviously.

23 First, the proposed DIP loan agreement contains an
24 error in paragraph 4.1(a), it's on page 30 of the black line
25 and counsel has agreed to fix this but collateral was referred

1 to in both the A and the B provisions of that paragraph. And
2 the first provision should refer to adequate protection
3 properties so that it clarifies the language. But I just
4 wanted to get that on the record.

5 The second is in the order, paragraph 8(c). The
6 parties have agreed to insert after the words of adequate
7 protection subject to paragraph 6(c) of this order --

8 THE COURT: Just hold on. We're in paragraph 8(c)?

9 MR. CROSS: It's page 22 of the black line.

10 THE COURT: Of the black line? All right. One
11 second. Is that entitled Interest Operation of --

12 MR. CROSS: Yes, it is.

13 THE COURT: All right. Actually on my copy I'm on
14 page 23.

15 MR. CROSS: I think you found it; you're doing better
16 than I was doing.

17 THE COURT: All right.

18 MR. CROSS: It begins "As adequate protection"?

19 THE COURT: Yes.

20 MR. CROSS: And then the next word is "and" and then
21 insert the words "Subject to paragraph 6(c) of this order."

22 THE COURT: Any objection? Is that agreed?

23 MR. HOLTZER: Yes, Your Honor.

24 MR. CROSS: The next three points and the only three
25 points I have are reservations of rights. Well, there's four

1 actually. The first is that the mezzanine holders want to
2 reserve their right to make a subsequent showing that they
3 should be entitled to adequate protection payments. And I
4 recognize that Your Honor has made that clear from the bench
5 but they asked me to raise it for a reaffirmation if they could
6 come back at a later date and make such a showing.

7 THE COURT: Well, my earlier comments were in the
8 nature of comments, I wasn't making any final determinations so
9 they certainly can come back and argue that they're entitled to
10 more than they're getting at the moment.

11 MR. CROSS: Correct. That was my understanding. The
12 second --

13 THE COURT: My only request would be, obviously,
14 especially when adequate protection is concerned, that's a
15 subject to be discussed with the debtors before going to Court.
16 And also, I would appreciate very much coordination of efforts.
17 I think there were four mezzanine lenders in the case or in the
18 cases. I do not ordinarily think it's fair to decide issues
19 that affect multiple parties without having all the parties, at
20 least, on notice. So I think that whatever is done should be
21 done in a coordinated fashion if at all possible.

22 MR. CROSS: This does not signal a rush to the court
23 by the mezzanine holders.

24 THE COURT: No, I don't assume that at all nor am I
25 inviting parties to do so.

1 MR. CROSS: Second point is that the parties -- the
2 lenders would like to reserve their rights to object to the use
3 of nondebtor cash.

4 THE COURT: What do you mean by that? That is they
5 want to continue the argument that their individual property
6 should be ring fenced?

7 MR. CROSS: No. They're nonbankrupt entities whose
8 cash is being swept into the operating account.

9 THE COURT: Being swept in rather than going out to?

10 MR. CROSS: Right. It's coming in.

11 THE COURT: And --

12 MR. CROSS: And so many of the lenders in the room
13 represent those nondebtor parties as well as the debtor
14 parties. And so they want the ability to come in and
15 subsequently object to that portion of cash management. It's
16 just reserving rights.

17 THE COURT: All right. The objection usually goes in
18 the other direction.

19 MR. CROSS: I understand that. But I think we've
20 dealt with many of those issues in the context -- we're not
21 relitigating things that we've already discussed with the
22 debtor.

23 THE COURT: All right.

24 MR. CROSS: And I'm --

25 THE COURT: No, I hear you. I'll wait for their

1 comment.

2 MR. CROSS: And I'm again wearing my hat as
3 coordinating counsel. The third point is that, and this is a
4 significant issue for many, that the findings of fact be
5 limited to determinations with respect to debtor in possession
6 financing and cash collateral. And I believe that's consistent
7 with the statements that were made throughout the hearing on
8 Friday. That this was the testimony for purposes of this
9 hearing and the issues that were in front of the Court. There
10 are parties who have independent motions in front of the Court
11 and they don't want to be prejudiced by a finding in this
12 proceeding with respect to their other action, a motion to
13 dismiss for example.

14 And then my colleague, Mr. Gottesman, is going to put
15 on a reservation of rights which in my individual capacity
16 support with respect to continuation of 552 liens because we do
17 not believe that's really in front of the Court. I will put on
18 the record, having stated these objections, that subject to the
19 552 reservation issue, the clients that I represent with
20 respect to forty-one debtor properties, believe that all of the
21 objections that we raised have been resolved.

22 THE COURT: Thank you. And thank you for your
23 coordination efforts.

24 MR. GOTTESMAN: Good afternoon, Your Honor. Lawrence
25 Gottesman of Bryan Cave on behalf of certain proctored level

1 secured lenders. I want to echo Mr. Cross' remarks, in terms
2 of resolution of our issues. The process that the debtor ran
3 resulted in material improvement to both the DIP and the cash
4 collateral, from our perspective. And but for this very
5 limited discrete issue, Your Honor, we're satisfied with both
6 the substance and the form of the order.

7 The only area in which we perhaps didn't reach
8 complete agreement was the extent of the reservation of rights.
9 It's our view that the issue of the application, the effect of
10 552(b) on any remaining cash is an issue, quite frankly, for
11 another day that need not and does not get resolved by the
12 order that Your Honor will enter presumably this afternoon or
13 tomorrow with respect to cash collateral and the DIP.

14 The debtor in discussions and good faith has
15 expressed a view to the contrary. That in fact use effectively
16 cuts off whatever rights might be there under 552(b).

17 THE COURT: What rights might be there in your view,
18 under 552(b)?

19 MR. GOTTESMAN: Under 552(b), Your Honor, to the
20 extent that our security documents provide, and we believe that
21 they all do, Your Honor, our pre-petition liens attach to any
22 post-petition cash. It's best illustrated in the following
23 way: The adequate protection lien that's been agreed to and
24 negotiated between the debtors and the secured lender group,
25 coordinated group, whatever term we're going to use for that,

1 Your Honor, is essentially limited to a net diminution amount.
2 And that diminution amount, to paraphrase the formula,
3 ultimately is a function of not only the net intercompany
4 claim, but the ultimate up or down movement of the value of the
5 real estate that secures the secured lender's claims.

6 552(b) on the other hand, at least in our view, isn't
7 tied to a diminution concept. It simply says to the extent
8 that there are products, proceeds and all the various other
9 items that are mentioned in 552(b)(1) of the code. And to the
10 extent the lenders' lien attach to such proceeds under its
11 terms, the Code provides that it attaches to those post-
12 petition products, proceeds and the like.

13 Now, whether or not that winds up being an amount
14 different then the adequate protection lien, I think will
15 depend upon all sorts of events that none of us can certainly
16 foresee today in terms of where the value of the underlying
17 collateral is when these cases are concluded.

18 I want get to the issue that Your Honor needs to
19 resolve today, one way or the other, we simply wanted to make
20 clear that to the extent there is a right under 552(b), to the
21 extent that that right, in fact, results in different rights
22 with respect to that cash at the end of the case, it's reserved
23 for us to talk about at that point in time. It may turn out
24 that in fact there's not an economic issue, depending upon
25 where these cases go, Your Honor, which is one of the many

1 reasons why we don't think that the Court needs to address it
2 today.

3 On the other hand, we don't think it's appropriate in
4 the context of this cash collateral order to waive those rights
5 any more than we would waive our rights to seek additional
6 adequate protection if circumstances change or any of the other
7 items that Your Honor has indicated that the Court is open to
8 business to consider, at some point in the future should be
9 appropriate.

10 THE COURT: So you're argument is that 552(b) means
11 more than just that the security interest extends to rents and
12 didn't just get rid of the old argument that you needed a
13 receiver or all of that. But that somehow it makes the
14 security interest inviolate.

15 MR. GOTTESMAN: Not so much inviolate but to the
16 extent there's unused cash -- here's the way we would
17 conceptualize the difference. The failure of adequate
18 protection claim under 507(b), Your Honor, is tied to
19 diminution.

20 THE COURT: Yes, it is.

21 MR. GOTTESMAN: I don't think 552(b) is tied to
22 diminution. It's applied to, essentially, whatever remains.
23 Now at the end of the day that might be the same or it might be
24 more.

25 THE COURT: Okay. I understand what you're saying.

1 Of course if you're going to make that argument the debtors may
2 bring out their big guns and ask you what the words "Except to
3 the extent that the Court after noticing a hearing and based on
4 the equities of the case orders otherwise," what that clause
5 might mean.

6 Fortunately, I haven't been asked to use -- they
7 haven't purported to use that clause. They are proceeding on
8 what I have observed seems to be fairly standard, well
9 recognized adequate protection provisions. And I'm very
10 please, actually, that I haven't had to get into the
11 intricacies of 552(b). But I understand that I might be lucky
12 enough later in the case to be asked to do so. And I think all
13 I'll say today, and I certainly can hear from the debtors, is
14 that the -- none of the provisions of 552(b) have really been
15 put before me today for resolution.

16 MR. GOTTESMAN: That's satisfactory. Thank you very
17 much, Your Honor.

18 THE COURT: Except that at least we haven't had to go
19 into lengthy analysis of the rights of a perfected receiver
20 versus what I assume would have been every state of the union
21 or at least forty-five of the fifty states.

22 MR. GOTTESMAN: I know we have --

23 THE COURT: So we can thank Congress for at least
24 having clarified things to that extent.

25 MR. GOTTESMAN: And we're all greatly relieved, Your

1 Honor.

2 THE COURT: All right. Then we're all on the same
3 page on 552(b).

4 MR. GOTTESMAN: Thank you very much, Your Honor.

5 THE COURT: Thank you.

6 MR. FELDMAN: Your Honor, David Feldman of Gibson
7 Dunn & Crutcher on behalf of the proposed DIP lenders.

8 The one thing I want to clarify, and I'm just not
9 sure what I'm hearing on the reservation of rights is, with
10 regard to cash collateral, which I understand to be cash that's
11 being generated in the estate and once it comes into the estate
12 from these nondebtor entities we have a specific agreement as
13 to the priority of our security interest in that cash
14 collateral. And in fact they had a very unusual granting of
15 adequate protection; we've given the secured lenders a first
16 priority lien limited to their adequate protection claim in
17 that cash.

18 And what I want to make sure I'm understanding is,
19 this reservation of rights and 552(b), I think what's
20 fundamental to our deal is that the only thing coming in front
21 of our perfected security interest in the cash is the adequate
22 protection lien and nothing else. I guess we can't find
23 ourselves at the end of the case saying no, you know what it's
24 not just the adequate protection lien, in addition it's an
25 additional claim that comes in front of our cash. If they're

1 going to reserve rights subject to the DIP, that's fine but I
2 don't think we can be in a position where we're waiting till
3 the end of the case to find out which cash is our cash
4 collateral.

5 MR. GOTTESMAN: Your Honor, I think I can alleviate
6 the DIP lender's concern. The reservation of rights does not
7 and is not intended to find whatever liens are granted to the
8 DIP lender pursuant to this order.

9 THE COURT: That's certainly my understanding.

10 MR. FELDMAN: That's fine.

11 THE COURT: Your lien is what it is.

12 MR. GOTTESMAN: Right. And the only thing that comes
13 ahead is the adequate protection lien that's granted pursuant
14 to this order in accordance with the terms of the order.

15 THE COURT: I think that's -- if that's not perfectly
16 clear in the documentation it should be made clear.

17 MR. GOTTESMAN: I can certainly represent on behalf
18 of my clients, Your Honor.

19 THE COURT: That certainly is my understanding.

20 MR. FELDMAN: I think it is clear but what I wanted
21 to make clear is that this additional reservation of rights on
22 the record didn't undermine what to us clear under the
23 documents.

24 MR. GOTTESMAN: It's not intended to.

25 THE COURT: It was not intended to and maybe we've

1 heard the last of 552, I'm not sure.

2 MS. GOLDSTEIN: No, you have not heard the last, Your
3 Honor, of this because we have a response to that. But I'd
4 like to respond to the reservation of rights and let you know
5 where we agree it's a reservation and where we think it's an
6 objection that we have to respond to, if that makes sense, Your
7 Honor.

8 THE COURT: Yes.

9 MS. GOLDSTEIN: There was not a discussion around,
10 and we all agree these are reservation of rights. Those are
11 the secured lenders' reservations of rights but we do have
12 issue with several of them.

13 THE COURT: Please go ahead.

14 MS. GOLDSTEIN: The first one, with respect to the
15 mezzanine lenders, we have no issue with. We understand that
16 they may come back to this court if they believe that
17 circumstances have changed. And we certainly agree that they
18 should come to discuss those with the debtors first. And that
19 is not an admission on our part that they're entitled to
20 adequate protection. But they do have every -- we're not
21 trying to impair their reservation of rights.

22 We have an issue with the reservation or objection, I
23 couldn't tell what it was, regarding the use of nondebtor cash.
24 There are nondebtors who generate cash flow and in the ordinary
25 course that cash is through the cash management system that has

1 always been applicable, swept to the parent and the parent uses
2 the cash as testified by Mr. Mesterharm.

3 That cash is not the subject of this cash collateral
4 order. With respect to the nondebtors, I think I can say there
5 are no defaults which would give the secured creditors any
6 rights to track cash because if there were they would be in
7 this court.

8 So these nondebtors generate cash. There may be
9 liens on the properties but there is no right to object to the
10 use of that cash, it's not cash collateral that is subject to
11 the jurisdiction of this Court. So, I didn't understand the
12 reservation of rights --

13 THE COURT: I'm not sure I understood it but perhaps
14 it was basically that by appearing here today on behalf of
15 certain lenders, we don't want there to be an implication that
16 nondebtors who are not here today are prohibited from asserting
17 their legal rights vis-à-vis the debtors if they wish. Now, I
18 don't know that this is the place to assert those, whether they
19 are or they aren't. But I don't think -- are any of those
20 issues before me today?

21 MS. GOLDSTEIN: Your Honor --

22 THE COURT: Other than --

23 MS. GOLDSTEIN: -- not a nondebtor.

24 THE COURT: Other than if the parties have their
25 contractual rights.

1 MS. GOLDSTEIN: Whatever rights they have, Your
2 Honor. But we're not -- we cannot agree that rights are
3 reserved as to that cash as cash collateral because they're not
4 subject to a proceeding.

5 THE COURT: There is -- all right.

6 MR. CROSS: Your Honor accurately stated it.

7 THE COURT: That cash isn't cash collateral.

8 MR. CROSS: Your Honor, I agree with you.

9 THE COURT: It's cash.

10 MR. CROSS: We have people here who represent -- I
11 mean, I have almost as many nondebtor clients as I have debtor
12 clients and there are concerns among a lot of the lender group
13 that their presence here would be misconstrued and their
14 interpretations with respect to this order. You stated it
15 exactly correctly. That was what was intended.

16 MS. GOLDSTEIN: Okay.

17 THE COURT: All right.

18 MS. GOLDSTEIN: The third reservation, that none of
19 the findings of fact in connection with this hearing could
20 apply to anything outside of DIP financing and cash collateral.
21 Your Honor, that's a very, very broad statement. For example,
22 if this Court determines that the proposed DIP financing is in
23 the best interests of the debtors, I do think that that's a
24 binding fact and I don't think that a lender for one of those
25 debtors can use that finding in connection, for example, with

1 respect to a motion to dismiss and say well it wasn't in the
2 best interest of my debtor.

3 I think there are things that are occurring in this
4 hearing that may or may not be applicable. And I don't think
5 the debtor could agree that every finding of fact in this
6 hearing is limited only to this hearing.

7 THE COURT: As I heard the reservation, it wasn't
8 that the Court wasn't necessarily making certain findings and
9 conclusions with regard to the use of cash collateral and the
10 DIP order but that these findings would not preclude any party
11 who had a particular motion, for example, from attempting to
12 expand the record with regard to their particular facts.

13 Mr. Mesterharm testified, we had a proffer from Mr.
14 Buckfire. And I think Mr. Mesterharm's testimony may have been
15 more broadly pertinent to, for example, motions to dismiss. I
16 have, I think, one already. I may have others. Although I
17 certainly don't invite them I don't, today, preclude them. I
18 will certainly hear them.

19 And I think in connection with such a motion a party
20 ought to have the right to supplement the record. If you wish
21 them to examine Mr. Mesterharm today to further expand the
22 record with regard to their particular facts, we can do that.
23 It would seem to me it would make more sense for those matters
24 to be reserved. And certainly the debtors can rely on a
25 general finding as a result of today's proceedings and the

1 proceedings last Friday. But it would seem to me parties
2 either have a right to cross examine today or reserve that with
3 regard to their particular positions. Because there have been,
4 obviously, a few parties who have asserted that their position
5 is unique or they have unique legal issues that they want the
6 Court to resolve. And I think we'd be extending these hearings
7 much more than we need to if we require that examination today.

8 Now, I was quite abrupt with some of the lender's
9 last week, in part because their right to cross examine was
10 being reserved.

11 MS. GOLDSTEIN: Your Honor, just to be clear, we
12 would agree that we're not trying to cut off any party's right
13 to make a record or to cross examine. But also, we do not want
14 to be precluded from relying on findings of this hearing, which
15 we would find helpful to us. So I think we would agree that
16 any other party's rights are reserved to expand the record, to
17 cross examine, to make a record but our rights are similarly
18 reserved or otherwise not precluded.

19 THE COURT: I would think that the most rational way
20 to proceed, if we need to proceed with individual motions, is
21 to -- for you to incorporate the record and start from there.
22 Incorporate the testimony of Mr. Mesterharm and then we start
23 from there.

24 MS. GOLDSTEIN: But Your Honor, we don't --

25 THE COURT: If we need to go down that route.

1 MS. GOLDSTEIN: We don't have a problem with that.

2 THE COURT: All right.

3 MS. GOLDSTEIN: But we do have a problem, Your Honor,
4 in reserving rights under Section 552(b). I think we all
5 understand that 552(b) clarifies, if properly perfected, the
6 lien on rents, on post-petition rents. And it's really no
7 different from the lien on post-petition proceeds. And, you
8 know, use of cash collateral occurs in many cases. I think
9 you've said it on the record, these are not difficult concepts.
10 It comes up all the time. And it's one thing to say that a
11 section gives you a lien on post-petition assets, the question
12 for the Court is what is the adequate protection that we are
13 providing for the use of that cash collateral? We are, indeed,
14 using the cash collateral. It is being taken by the debtors.
15 It's being used not only to pay the expenses of a specific
16 property but being used to pay corporate expenses that keeps
17 all the properties going.

18 So at that point, Your Honor, they no longer have a
19 lien on the rents they have the replacement lien. And the
20 replacement lien is designed to protect these secured
21 creditors. And a concept of adequate protection is about
22 protecting the decrease in value of the secured creditor's
23 interest in the collateral. And we have a formula, which we
24 believe in our order, does that and many of the secured lenders
25 do not object to it. And it is the lesser of the net rent

1 differential or the diminution in value. And I can give you
2 two extremes, Your Honor, it's very clear how that works.

3 If a secured creditor is oversecured today and we've
4 used the cash collateral of that secured creditor and at
5 confirmation the secured creditor is still oversecured today
6 because in that case there was a very adequate equity cushion,
7 then we will deal with the secured creditors' oversecured
8 position at that time. And if we don't have a consensual plan
9 and we have to confirm a plan under 1129(b), we will be looking
10 at protecting the security interests in the secured creditors'
11 collateral to the extent of its allowed secured claim.

12 If we have an undersecured creditor, use the example
13 because Citibank says it's undersecured, if that's true it
14 could very well be that they suffer more diminution because
15 we've used their rents. So they may, indeed, have more of lien
16 on the cash than perhaps Mr. Cross' clients, and I'm talking
17 about at the end of the case when we're looking at
18 confirmation, who might still be very oversecured if they are
19 indeed oversecured.

20 So we think we have the proper measurement, in terms
21 of the definition of adequate protection. And the adequate
22 protection we have to provide under Section 362, rents are no
23 different from proceeds and it's clear that rents are right in
24 the section that defines cash collateral. So we think we have
25 provided the appropriate adequate protection. The appropriate

1 measurement is to protect against the diminution in value of
2 the secured creditors' interests in the collateral. We can
3 fight about what that diminution is later. I'm not trying to
4 limit anybody's rights in that regard. But we don't think
5 there's an inviolate lien that you can't use and adequately
6 protect.

7 And Your Honor, my concern is that the DIP lender, I
8 think, is relying on our formula in terms of what is the lien
9 ahead of them. I think the unsecured creditors are relying on
10 that formula in terms of what encumbrances they come behind. I
11 think this is very important.

12 MR. STAMER: Your Honor, I've got a few comments with
13 respect to the DIP order. If you'd like I can do them all or I
14 can just do the 552 issue, I'd leave it to you.

15 THE COURT: Why don't you do them all?

16 MR. STAMER: Why don't we start with the 552 issue?
17 It should come as no surprise to the Court that we agree with
18 the debtors' position yet again. Critical to the committee's
19 support is an understanding regarding the accumulation of cash
20 at the holding company and the provision of adequate protection
21 as defined.

22 What the secured lenders are attempting to do, Your
23 Honor, is preserve their ability at the end of the case to not
24 only demand payment in full but payment in full in cash or in a
25 big slug of cash. Your Honor, we believe what the --

1 THE COURT: I don't hear an end of the case argument.
2 I'm delighted, in one sense, to hear the parties talking about
3 the end of the case. I think that's very positive and
4 hopefully there will be an end to the cases, much sooner than
5 might be expected. But I didn't hear an end of the case
6 argument. I did from Ms. Goldstein but that's not what I heard
7 from the lenders.

8 MR. STAMER: Your Honor, I believe that's a part of
9 where they're going with the reservation. The ability not to
10 be cut off from that argument and somehow claw back cash that
11 has left their estate, notwithstanding that the Court has found
12 they're adequately protected and in fact that they're
13 oversecured and will be paid in full.

14 So Your Honor, our position is that the debtor is
15 right on this point, that in fact it would be inappropriate to
16 allow the 552 rights to outlive the entry of this order.

17 Your Honor, if I could, my overall comments on the
18 DIP. The committee supports the DIP loan. I don't find
19 myself, this early in the case, often supporting the entry of
20 the order approving a DIP and a cash collateral order when
21 representing the committee. But Your Honor, I think what we
22 have here is a somewhat remarkable result, as you've heard on
23 the record. We have had an extremely successful auction that
24 has preserved very significant value for the benefit of the
25 debtors, the estates and all the stakeholders.

1 I just have, Your Honor, one reservation to put on
2 the record and then a comment with respect to 503(b), which I
3 think is important for the Court to understand as we move
4 forward.

5 Your Honor, as you'll recall in the committee's
6 objection, we raised an issue with the concept of the debtors'
7 exclusive ability to exercise the conversion right in the DIP.
8 Their ability to, if they choose, to convert the DIP loan into
9 either equity or debt. Our concern was that that should not be
10 a unilateral right. And Your Honor, as people have said, some
11 points you get in an agreed order and some you don't, this is
12 one we didn't get. But I wanted to make sure the Court
13 understood that by virtue of us supporting the loan, we are not
14 deferring throughout the case, or even more important at the
15 end of the case, to the debtors' discretion with respect to the
16 exercise of this conversion right.

17 THE COURT: Do I hear you saying you're reserving
18 your rights?

19 MR. STAMER: I'm sorry, Your Honor. But yet again
20 and I know all rights are reserved. It is our sincere hope,
21 Your Honor, that the conversion issue will be one part of fully
22 consensual plan of reorganization. If it's not or if there are
23 other issues, Your Honor, as you've said you're open for
24 business and we'll be here to talk to you about it.

25 One other point and then I'll sit down, Your Honor.

1 And that is with respect to 503(b). You'll recall, at the end
2 of our last hearing we had a discussion about the importance of
3 503(b), that we anticipated the committee would be supporting a
4 503(b) application for bidders that participated and added
5 value. Our position hasn't changed. In fact, I wanted to
6 supplement some of the things that went on.

7 Your Honor, in connection with the last go round of
8 the auction, the committee was in contact with two of the
9 bidders, one the successful bidder and the other the Goldman
10 Sachs Group and Brookfield, in connection with our support for
11 a substantial contribution application. And the substantial
12 contribution was two part, it was reasonable fees and expenses
13 and an additional amount on top of that.

14 Your Honor, it was our view and it was the committee
15 that was involved in the discussions, that it was necessary and
16 appropriate to bring the DIP lenders back to the -- the
17 competitive DIP lenders back to the process, that in fact we
18 provide them with some assurances that if they lost that in
19 fact they would be compensated for their out-of-pocket expenses
20 and the commitment they made for purposes of this process.

21 As it all turns out, Your Honor, the successful DIP
22 lender, subject to Your Honor's approval, will be Fairlawn.
23 There will be no 503(b) application for Fairlawn and no payment
24 will be made. There will, Your Honor, for the other bidder,
25 the Goldman and Brookfield group, the committee has given them

1 our support for a 503(b) application in the amount of five
2 million dollars, staged over, if approved, payable upon the
3 entry of the order approving the application. And then another
4 portion payable at the end of the case.

5 Again Your Honor we think that the value provided by
6 each of the two bidders, the competing bidders, inure to the
7 great benefit of the estates. And when that application is
8 filed, Your Honor, you can anticipate the committee will be
9 supporting the application.

10 And again, I just wanted to bring that to the Court's
11 attention --

12 THE COURT: All right.

13 MR. STAMER: -- in connection with this process.

14 THE COURT: Now, you've referred to Goldman and
15 Brookfield. Is that distinct from the Pershing Square Group?

16 MR. STAMER: It is, Your Honor, and I'm glad you
17 asked. There were three bidders at Monday night's auction.
18 Pershing, you'll recall, was the original proposed DIP lender.

19 THE COURT: Yes.

20 MR. STAMER: They received, pre-petition, a fifteen
21 million dollar payment, a commitment fee, whatever it's called.
22 As you might anticipate, Your Honor, the committee will look
23 into that payment to see whether or not it would be appropriate
24 for a portion or all of that payment to come back into the
25 estates. But we're not here to spend a lot of time on that

1 issue. We believe, again, to set forth an even playing field
2 and to maximize the likelihood of a competitive auction, which,
3 Your Honor, we clearly had, it was important to make the
4 representations and agreements to the other two bidders in
5 connection with Monday night's auction.

6 So again, Your Honor, we are, as I said, supportive
7 of the entry of the order approving the DIP loan, and I just
8 wanted to bring all the information as it relates to the 503(b)
9 issues before the Court in connection with the DIP. Thank you,
10 Judge.

11 THE COURT: Thank you.

12 MR. FELDMAN: David Feldman again on behalf of the
13 DIP lenders. I just want to respond to one of the points that
14 Mr. Stamer raised on reservation of rights with respect to our
15 debt equity conversion. I'm not exactly sure what he means,
16 but I just want to make clear, we have an agreement with the
17 company --

18 THE COURT: If you're --

19 MR. FELDMAN: -- which says that we have the right --
20 the company has an option to convert under circumstances. What
21 I want to make clear is we're giving that right to no one other
22 than the company. If Mr. Stamer wants the right to stand up
23 and argue whether the company should or shouldn't exercise the
24 right or seek to compel the company to do something or another
25 in the bankruptcy case, that's one thing. But we've not given

1 the right to anybody else or any other -- frankly, a creditor
2 plan --

3 THE COURT: I think the papers are perfectly clear on
4 that point.

5 MR. FELDMAN: Okay. Thank you.

6 THE COURT: And it was my term "reservation of
7 rights", not his.

8 MR. FELDMAN: Okay. Thank you, Your Honor.

9 MS. GOLDSTEIN: Your Honor, I don't want to belabor
10 the point on the conversion, but Mr. Stamer said it was a
11 unilateral right of the debtor. I agree with what counsel for
12 Farallon has said. We understand the right to be the debtors'
13 option. But, you know, it really is a plan issue, Your Honor,
14 and I only wish that a plan was a unilateral process for the
15 debtor, but we all know that it's a multilateral process and
16 the committee will clearly be a significant party in those
17 discussions. And, you know, if they don't like the plan that
18 we seek a creditor vote on, they can certainly object to it.
19 So I just wanted to make sure that that was --

20 THE COURT: All right.

21 MS. GOLDSTEIN: -- the understanding on the
22 reservation of rights. The debtor has not made any promises in
23 connection with Section 503(b). We will review the application
24 when it is filed.

25 THE COURT: All right, anyone else?

1 MR. MEYERS: Yes, Your Honor, Todd Meyers for various
2 lenders that are having their loans serviced by ING Clarion.
3 We had a couple of remaining points in the DIP order, and at
4 the break I was able to talk to Mr. Holtzer and work these out.
5 And I'll just make a statement on the record which hopefully he
6 will confirm. Section 7 or paragraph 7 of the DIP order, which
7 deals with super-priority administrative claims of the DIP
8 lenders, we just sought clarification that the super-priority
9 administrative claims of the DIP lenders were only against the
10 obligors and not the property level debtors. As you know,
11 we've achieved success in getting rid of the guarantees that
12 would be a hallowed right if they had administrative claims in
13 our estates. The language in section 7 was not clear as to who
14 the administrative claim was against, and so we discussed that
15 with Mr. Holtzer and my understanding is he's agreed to confirm
16 that those would only be in the estates of the obligors and not
17 the property level debtors.

18 The other point that we sought clarification with is
19 paragraph 8 of the DIP order which deals with use of cash
20 collateral. There is a provision in there that says that "all
21 adequate protection parties are ordered to relinquish control
22 over cash collateral to the debtors and shall not interfere
23 with any effort by the debtors or their banks to redirect cash
24 collateral". And all we wanted to make clear there, Your
25 Honor, is that if a debtor ceases to be a debtor in this case,

1 and we do have a pending motion to dismiss -- if a debtor
2 ceases to be a debtor in the case, our understanding is that
3 based on the way the debtor defined cash collateral in this
4 order, that nondebtors' cash will no longer be cash collateral
5 and therefore, this restriction would not apply. And again,
6 Mr. Holtzer's agreed to confirm that as well.

7 THE COURT: All right.

8 MR. HOLTZER: Yes, Your Honor, we confirm both
9 reports.

10 THE COURT: Thank you.

11 MR. MEYERS: Thank you, Your Honor.

12 MR. SELBST: In the interest of cleaning up the
13 record, Your Honor, I wanted to clarify one thing. Just before
14 the --

15 THE COURT: You need to state your name --

16 MR. SELBST: I'm sorry.

17 THE COURT: -- for the record and your client.

18 MR. SELBST: I'm sorry. Yes. Stephen Selbst,
19 Herrick, Feinstein for Citicorp NA. Your Honor, just before
20 the break the debtors made an allegation that my clients had
21 interfered with cash collateral on a post-petition basis. I
22 was surprised by the charge, first, because I hadn't heard
23 about it until this court and I had no knowledge of it. But I
24 want to represent to the Court that if any cash collateral has
25 been taken, it certainly will be resent to the debtor. But I

1 also wanted to say that I checked with my client during the
2 break and they have no knowledge about this. Now, if there's
3 any confusion I do intend to pursue this, but it's certainly
4 not Citicorp's intention to interfere either with the automatic
5 stay or an order of this Court and we will get this resolved.

6 THE COURT: Thank you. Now, while you're here, I
7 gather you have a pending objection to the use of cash
8 collateral portions of the DIP order but not to the DIP loan
9 per se, is that correct?

10 MR. SELBST: Just as I told you before, that's
11 correct.

12 THE COURT: And in terms of your objection, do you
13 wish to make any further record? Do you need to, at this point
14 in time in the case, take any further facts into account other
15 than your statement that in your view or in your client's view
16 it's under-secured?

17 MR. SELBST: Your Honor, nothing beyond what I said
18 to the Court previously.

19 THE COURT: No further examination?

20 MR. SELBST: That's correct, Your Honor.

21 THE COURT: All right, thank you. Anyone else?
22 There were some other existing objectors before the break. One
23 was Mr. Abel. Are you here? Have you gotten answers to your
24 questions?

25 MR. ABEL: I've gotten answers to my questions, Your

1 Honor. We're fine.

2 THE COURT: All right. So that's resolved. Mr.
3 Rosenberg?

4 MR. ROSENBERG: I've got an answer to the reservation
5 of rights point that I had put on the record, an objection
6 to --

7 THE COURT: Well, come forward, if you would, please,
8 so that the machine can pick you up and that you can be heard
9 in the overflow room.

10 MR. ROSENBERG: I apologize, Your Honor.

11 THE COURT: No, no problem.

12 MR. ROSENBERG: The debtor has agreed to the issue
13 respecting the reservation of rights and the budget that I had
14 alluded to earlier, so that will be put on the record that
15 those rights are reserved with respect to the charges against
16 the debtor and therefore the adequacy of the use of cash
17 collateral to that extent. So that is no longer an issue for
18 today. That was the only issue that I might have needed to
19 cross-examine on.

20 THE COURT: Right.

21 MR. ROSENBERG: What remains, Your Honor, is
22 Deutschebank's objection, to the extent it applies to
23 Deutschebank, vis-a-vis the adequate protection proposal and
24 the cash management proposal. And indeed, with respect to the
25 order, I would refer Your Honor to exactly the same provision

1 in paragraph 8 that was just referred to. Obviously, we object
2 to that provision to the extent we will be seeking different
3 relief.

4 THE COURT: You have to explain what you mean by "the
5 provision" --

6 MR. ROSENBERG: Okay. That --

7 THE COURT: -- in paragraph 8 --

8 MR. ROSENBERG: Yes, Your Honor.

9 THE COURT: -- and exactly -- I think you said you
10 wanted to argue.

11 MR. ROSENBERG: I do, Your Honor. We want to, per
12 the stipulation that Your Honor referred to before lunch, put
13 in additional evidence which are the documents that pertain to
14 this relationship pre-petition.

15 THE COURT: All right. And then you'll describe them
16 to me?

17 MR. ROSENBERG: I will, indeed, Your Honor.

18 THE COURT: All right.

19 MR. ROSENBERG: Shall I proceed and do that now? I'm
20 not clear on the process.

21 THE COURT: Sure. As far as I'm concerned, why don't
22 you go ahead and then we'll deal with your objection, at least
23 in terms of argument on both sides, and then any other
24 objections that are still outstanding.

25 MR. ROSENBERG: Okay. That's great, Your Honor. The

1 language that I was referring to in the cash collateral order
2 is paragraph 8 that says, "Pursuant to the terms and conditions
3 of this order and the DIP loan agreements, each debtor is
4 authorized to use all cash collateral wherever it may be
5 located and regardless of whether it is in an account
6 controlled by any adequate protection party."

7 No problem with that sentence. It's the next one:
8 "All adequate protection parties are ordered to relinquish
9 control over all cash collateral to the debtors and shall not
10 interfere with any effort by the debtors or their banks to
11 redirect cash collateral to the main operating account." And
12 that, Your Honor, goes to the essence of what we believe is
13 different about Deutschebank and what I would like to address
14 to the Court.

15 THE COURT: All right.

16 MR. ROSENBERG: I would begin, of course, Your Honor,
17 by moving into evidence the documents which the debtor has
18 stipulated may go into evidence with respect to authenticity
19 and admissibility.

20 MR. HOLTZER: No objection, Your Honor.

21 MR. ROSENBERG: Okay. I would refer, in particular,
22 Your Honor, to --

23 THE COURT: Do you have a book of --

24 MR. ROSENBERG: We do, Your Honor. I thought you had
25 it, but if you don't --

1 THE COURT: Well, I don't, but I've read your
2 objections and, as I understand it, you're referring in every
3 case to specific covenants in your various loan documents
4 establishing certain requirements with regard to the loan, is
5 that correct?

6 MR. ROSENBERG: Your Honor, I'm actually referring
7 to --

8 THE COURT: Provisions and covenants.

9 MR. ROSENBERG: -- the specific documents called cash
10 management agreements --

11 THE COURT: Right.

12 MR. ROSENBERG: -- which are not the same, contrary
13 to the debtors' allegations --

14 THE COURT: Right.

15 MR. ROSENBERG: -- as all the other cash management
16 agreements.

17 THE COURT: Right. Now, if I assume and find that
18 your cash management provisions were different from all of the
19 others and more restrictive --

20 MR. ROSENBERG: Yes.

21 THE COURT: -- then, in connection with a cash
22 management order, I could find, could I not, that despite the
23 fact that your provisions were different, that nevertheless
24 their cash management order is appropriate and the cash
25 collateral, the adequate protection provisions necessarily were

1 adequate under the circumstances.

2 MR. ROSENBERG: You certainly could so find, Your
3 Honor. I would hope to convince you otherwise.

4 THE COURT: All right. But I just wanted to
5 indicate --

6 MR. ROSENBERG: Oh, no, you --

7 THE COURT: -- that you may convince me, and I'll
8 hear from the debtors, that your provisions were different, but
9 you also have to convince me that that difference must carry
10 over or should carry over into these bankruptcy cases.

11 MR. ROSENBERG: I would amend that only slightly,
12 Your Honor, in your favor. I have to convince you that they
13 are sufficiently different, that the Deutschebank is entitled
14 to more and better adequate protection than is being generally
15 offered even if not a complete carry-over of the provisions.

16 THE COURT: All right.

17 MR. ROSENBERG: And I'm prepared, I hope, to so
18 convince you.

19 THE COURT: All right.

20 MR. ROSENBERG: There are two major reasons why we
21 are different, Your Honor. One involves the cash management
22 agreements. Now, the debtor, I believe, frankly, has done us a
23 favor by adding to the exhibit list the general cash management
24 agreement that I think they're going to tell you all the
25 parties other than Deutschebank have and which probably is

1 consistent with the one that Deutschebank used to have.

2 Interestingly, it's dated 2005. And they're going to tell you
3 that it's the same.

4 Well, let me tell you why it's different in essence.
5 That agreement, the one that applies to all parties, provides
6 that the debtor controls the cash. Yes, it goes into various
7 accounts in the name of the secured creditor. But number one,
8 either before or even after it goes into those accounts, the
9 debtors can remove it from those accounts and take control of
10 that cash. That is subject only to what is defined in that
11 agreement as a cash management event, essentially a breach of a
12 covenant, then the debtor loses that right. And if the debtor
13 cures the covenant, the debtor has the right again. So when
14 the debtor refers to those as cash traps, that's a very
15 accurate description. Those are cash traps under which if
16 there's a breach the cash is trapped. If there's no breach it
17 belongs to the debtor. Furthermore, to the extent of any
18 excess cash after it goes into the accounts, you know, labeled
19 for taxes, insurance, etcetera, that cash automatically goes
20 back to the debtor under those agreements. No question about
21 it.

22 Our agreement, Your Honor, is different. Our
23 agreement never permits that cash to go back to the debtor.
24 The control of the cash is exclusively within the realm of the
25 secured creditor under all circumstances, and there is no

1 provision for any excess cash to go back to the debtor. To the
2 contrary, the waterfall provides for the use of every dollar of
3 cash within the estate. And that, Your Honor, is the second
4 reason why our case is different from all the others. The
5 Fashion Show property has a second lien on it in favor of the
6 Palazzo property -- or in favor of the secured creditors of the
7 Palazzo property. So that every dollar that comes out of the
8 mechanism that I just described is to the immediate detriment
9 of the second lien holder. The second lien holder bargained
10 for every single dollar to pay down the first lien, to the
11 extent there were available dollars.

12 THE COURT: That second lien holder is, under the
13 debtors' proposal, to receive adequate protection in the form
14 of interest at the nondefault rate, maintenance of the
15 properties and the like. Is that correct?

16 MR. ROSENBERG: That's absolutely true, Your Honor,
17 and I will hope to convince you that because of the closed
18 system which the debtors propose to be replaced, the adequate
19 protection being offered is not adequate on these facts.

20 THE COURT: Now, the closed system, if I understand
21 it, results in a faster repayment of the loan to your clients,
22 is that right?

23 MR. ROSENBERG: Well, I'm not sure it's faster, Your
24 Honor. But remember, the reason this was put in place, the
25 reason why we have a different system is because the loan

1 matured -- not defaulted and accelerated, matured.

2 THE COURT: Right.

3 MR. ROSENBERG: Okay. So we're entitled to it being
4 paid. This isn't a prepayment in any way, shape or form.

5 THE COURT: And are you telling me that every other
6 lender whose debtor is in bankruptcy is not facing a default
7 that at least on the documents that their lawyers produced
8 entitle them to payment?

9 MR. ROSENBERG: I wouldn't dream of saying that, Your
10 Honor.

11 THE COURT: So everybody is facing a payment default.

12 MR. ROSENBERG: Not everybody had a payment
13 default --

14 THE COURT: It may hurt you more. I mean --

15 MR. ROSENBERG: Eight months prior to -- not a
16 payment default, a matured obligation, the result of which was
17 to put this system into place. And yes, it hurts us more and
18 that's why we're entitled to better adequate protection for
19 exactly that reason.

20 THE COURT: It hurts you more because why? Because
21 the loan --

22 MR. ROSENBERG: It hurts us --

23 THE COURT: -- matured some months ago --

24 MR. ROSENBERG: It hurt --

25 THE COURT: -- and the debtors couldn't pay it and

1 they didn't file sooner so that this agreement wasn't put in
2 place. Is that why it hurts you more? How much have your
3 clients accumulated in interest over this past period of time
4 since maturity?

5 MR. ROSENBERG: I don't know the answer to that. I
6 can certainly find out if you consider it relevant.

7 THE COURT: Well, no, I don't think it's material. I
8 just --

9 MR. ROSENBERG: But I understand the input of your
10 rhetoric certainly.

11 THE COURT: Well, I assumed that you would.

12 MR. ROSENBERG: And I did.

13 THE COURT: Do you have any authority -- I did read
14 your papers, I looked for authority that would support your
15 position, and I recognize that this is not an ordinary single
16 asset real estate case. Indeed, you have several projects that
17 are themselves intertwined here. But I looked for some
18 authority that would apply the standard provisions of the
19 Bankruptcy Code, that go back now some thirty years, to a
20 situation like this. I could not find very much authority that
21 was particularly applicable, although the debtors do cite, for
22 example, the TWA cases on the effectiveness of pre-petition
23 agreements during the post-petition period.

24 MR. ROSENBERG: Your Honor, the authority we cited to
25 you certainly is not directly on point, but it does go to the

1 care with which adequate protection needs to be looked at when
2 it is proposed that the cash collateral will be used for
3 purposes other than the debtor in question.

4 THE COURT: Are you suggesting that these parties
5 here are not taking care with regard to these orders?

6 MR. ROSENBERG: Your Honor, here's what worries me
7 about the orders, okay? In exchange for this closed cash
8 system, we are being offered an undifferentiated pro rata share
9 of a cash collateral pool and --

10 THE COURT: A lien on that pool.

11 MR. ROSENBERG: Yes, but a pro rate undifferentiated
12 lien, right? It's not our own money in a pile and, by
13 definition, Your Honor -- by definition, the good companies, if
14 you will, are contributing to the bad companies, by definition.
15 Otherwise it wouldn't be necessary, right? So at the end of
16 the day it is not at all clear that there will be sufficient
17 cash to repay the good companies for the use of cash collateral
18 in favor of the bad companies.

19 Now, the debtor will say that's why a second lien on
20 the former Goldman collateral is being given. Well, the answer
21 to that, Your Honor, again, is this is an undifferentiated,
22 silent, second, payable only, or foreclosable only under very
23 limited circumstances, if and when the DIP lender is already
24 paid out. It's a very limited value. You know, in the old
25 days, Your Honor, we used to say the only adequate protection

1 for cash is cash. Now, I know we've moved away from that
2 position.

3 THE COURT: You said that on behalf of your secured
4 creditor clients.

5 MR. ROSENBERG: No, that's --

6 THE COURT: And --

7 MR. ROSENBERG: Fair enough.

8 THE COURT: And the judges, I assume, went back to
9 the words of the statute and looked at the fact that number
10 one, we don't have a definition, per se, but we have several
11 examples, all of which are preceded with the word "or".

12 MR. ROSENBERG: Your Honor, there is no question --

13 THE COURT: In Section 361.

14 MR. ROSENBERG: There is no question that this
15 statute gives you an enormous amount of discretion to determine
16 what is appropriate here, and I wouldn't dream of suggesting
17 otherwise. What I am trying to convince Your Honor of,
18 apparently not terribly successfully, is that you have to look
19 at what is being given up in making the determination as to
20 what is adequate. There is some kind of a relationship between
21 the two. And while this package may be perfectly adequate for
22 those who had a system where they already did not have control
23 of the cash in the sole discretion of the debtor every time the
24 debtor decided to remove the cash, because that's what the
25 agreements provided, that is not this agreement.

1 And I ask Your Honor to take that into account in
2 deciding whether it is an appropriate exercise of discretion to
3 say that this complete control over excess cash, which was
4 indeed available to pay down the debt, is adequately protected
5 by a pro rata lien on cash collateral which by definition is
6 going to benefit others at the expense of the cash flow
7 positive entities and an undifferentiated second lien -- silent
8 second lien on real estate. I suggest, Your Honor, that that's
9 not a fair tradeoff. Thank you.

10 THE COURT: Thank you.

11 MR. STROCHAK: Good afternoon, Your Honor. Adam
12 Strochak, Weil, Gotshal & Manges for the debtors.
13 Deutschebank's comments are that its cash management
14 arrangement was somehow substantively different than the ones
15 in place for every other debtor in these cases. And that's
16 just categorically incorrect. Deutschebank had a flavor of
17 cash trap, in our view, that is slightly different than some
18 others and identically similar to many others in this case.

19 It's not correct that the Fashion Show and Palazzo
20 loans were the only ones that had matured upon the filing of
21 these cases. There are others. They are laid out in the
22 declaration that we submitted from Mr. Mesterharm. The Chico
23 property, the Prince Kuhio property, the Jordan Creek property,
24 they were all matured loans and all had cash traps in place
25 that were operating substantially the same way as the ones for

1 the Fashion Show and Palazzo properties.

2 Let me take a look and just bring the Court up to
3 speed on where things are. Deutschebank is holding
4 approximately fifteen million dollars of the debtors' money at
5 this point. Since the commencement of the cases, the debtors
6 have not received reimbursement of the expenses that they have
7 paid on behalf of the Fashion Show and Palazzo properties. So
8 the cash management agreement that Mr. Rosenberg refers to
9 isn't working the way he said it was supposed to work. They're
10 holding that money right now, to the detriment of the estates.

11 The suggestion that the agreements that were in place
12 pre-petition for Fashion Show and Palazzo are somehow a totally
13 different variant are simply unfounded, and that's found in the
14 documents that Your Honor has before you. In the stipulation
15 we have given Your Honor the cash management agreements that
16 were in place prior to the ones that were instituted in
17 December when the loan matured and went into a forbearance.
18 And if you run through those provisions, for example in
19 Exhibit H to the stipulation, there is the original agreement
20 for the Palazzo property. If you run through section 4 of that
21 you'll see what happens is they run through a waterfall. That
22 is, the rents are collected, they are put into a series of
23 reserve accounts. They're used to pay taxes and insurance.
24 They're used to pay the lenders' fees on the account. They're
25 used to pay interest, operation and maintenance of the

1 properties, other reserves principal. And they go through this
2 waterfall that is substantially identical to what would happen
3 under the agreement that Mr. Rosenberg wants to enforce right
4 now.

5 If you look at the old agreement, which is very
6 similar to what's in place for many of the debtors' properties.
7 If you look at the old agreement, it says that in the event of
8 default, if there's a payment default on the loan, the money
9 does not go back to the debtor. The expenses get paid, the
10 reserves get established, but the excess cash does not go to
11 the debtor, which is exactly the situation which exists -- or
12 existed pre-petition that Mr. Rosenberg is arguing is
13 completely different than anything else.

14 The difference between the Deutschebank agreements
15 that were in place pre-petition and the older agreements that
16 were done in these same loan documents is simply where that
17 account resides. The current agreements are what I would call
18 pre-triggered agreements because the loan was in default at the
19 time those agreements were entered into. The restrictions on
20 use of cash were in effect immediately under those documents.
21 So the agreements were revised to be in this pre-triggered
22 state, so you didn't have the language in the agreement that
23 says as long as there's no default this is how it works: the
24 cash comes in, the debtors get the cash, the debtors pay the
25 expenses. You didn't have that paradigm under the agreements

1 that were in place pre-petition because those loans were
2 already in default when that was done. So all it did was it
3 essentially pre-triggered those agreements.

4 THE COURT: Was there a pre-petition cash account
5 with any money in it at the time of the filing?

6 MR. STROCHAK: I believe there was, Your Honor. That
7 was what Deutschebank was holding.

8 THE COURT: The fifteen million dollars is what's
9 accumulated as well since the date of the filing?

10 MR. STROCHAK: The fifteen million is both pre and
11 post, Your Honor.

12 THE COURT: Pre and post.

13 MR. STROCHAK: Yes, there was a pre-petition balance,
14 I believe, and then it's been added to because rents have come
15 in since then, and it's continued to grow because Deutschebank
16 has not been reimbursing the debtors for any expenses.

17 THE COURT: So having made this point separately, are
18 they entitled to adequate protection of that pre-petition cash
19 that they had in their account?

20 MR. STROCHAK: I think they have it, Your Honor.

21 THE COURT: They have it.

22 MR. STROCHAK: I think they have it, Your Honor. And
23 anything that's been up-streamed -- anything that is going to
24 be up-streamed in the course of this case --

25 THE COURT: Will be protected.

1 MR. STROCHAK: -- that is protected, Your Honor, yes.

2 THE COURT: All right. Now, they say that fifty-two
3 of the fifty-four debtors or something like that, you state in
4 your papers, have the same cash management program, and they're
5 the other two? Is that your understanding?

6 MR. STROCHAK: No, Your Honor, that's not my
7 understanding of what we were saying in the papers. We were
8 just talking about the state of the agreements because you did
9 have these different agreements that had been done pre-
10 petition. It was just a reference to the fact that we had
11 these different agreements out there.

12 THE COURT: All right.

13 MR. STROCHAK: The suggestion that they are somehow
14 not adequately protected because the cash is undifferentiated,
15 because the lien is undifferentiated, is incorrect, Your Honor.
16 We demonstrated through Mr. Mesterharm's testimony and
17 Exhibit 7 that the debtors have adequate cash and assets to
18 cover the anticipated balance of the entire amount of cash that
19 will be subject to the aggregate adequate protection lien on
20 behalf of all secured creditors, secured mortgage lenders.

21 Mr. Mesterharm's analysis, the Court will recall,
22 broke it into two pieces, essentially, the cash flow positive
23 piece and the cash flow negative piece, and demonstrated that
24 over the course of the cases the debtors will have ample
25 assets -- cash and other assets to satisfy the cash flow

1 positive piece. So the suggestion that Deutschebank is somehow
2 funding bad properties with its cash flow on a good property is
3 incorrect. There is enough assets and cash to satisfy all of
4 the adequate protection claim, and we've demonstrated that.

5 What Mr. Rosenberg seems to be suggesting is that he
6 wants to revert to a pre-petition world where he was able to
7 take the excess cash and use it to pay down the debt. And that
8 world doesn't exist any more. We're in Chapter 11 now and
9 secured lenders can't just take the excess cash and use it to
10 apply to their principal and pay down their debt.

11 We think we've come up with an adequate protection
12 package that is fair, that protects all the secured lenders'
13 interests. And the suggestion that one lender should be able
14 to use excess cash generated from its property to pay down
15 principal, while none of the others in the case can do that, is
16 simply inappropriate and unnecessary in order to protect their
17 interests, Your Honor, as we have demonstrated.

18 The suggestion, Your Honor, that Fashion Show and
19 Palazzo are special because they are inter-related and there is
20 a second lien, is also not a justification for treating the
21 lender for those two properties differently in these cases than
22 everybody else. There are other loans and other properties
23 that are cross-collateralized, Your Honor. And I think as the
24 Court has already indicated, the second lien interest is
25 protected as well because the interests in the cash are

1 adequately protected through the package that we have offered.

2 I think that is all I have at this point, Your Honor,
3 unless you have any questions.

4 THE COURT: Thank you.

5 MR. STROCHAK: Thank you very much.

6 THE COURT: All right. Mr. Rosenberg, anything
7 further? Or anyone else after him?

8 MR. ROSENBERG: Just very briefly, Your Honor.

9 Number one, I did not suggest -- I think I was quite clear in
10 not suggesting that this Court could not have a use of cash
11 collateral in exchange for adequate protection. I suggested
12 that under the circumstances this adequate protection was not
13 adequate.

14 Number two, I am completely puzzled by the debtors'
15 continuing allegation that Deutschebank somehow, well, either
16 violated the automatic stay, according to Mr. Strochak, or
17 didn't violate the automatic stay but should have paid expenses
18 and failed to do so, according to Mr. Mesterharm, kind of
19 inconsistent, but either way I don't get it.

20 Your Honor, what actually happened is when Your Honor
21 entered the interim order, the one that I thought very clearly
22 said "maintain existing situation in place pending the final
23 order", the debtor had U.S. Trust revoke Deutschebank's
24 signature cards. So Deutschebank lost control over these
25 accounts at this point. So frankly, I don't know what they're

1 talking about. They're trying to paint us with a brush as a
2 bad guy, but if we didn't have control over the accounts
3 because they revoked the signature cards, I'm kind of puzzled
4 as to how we either violated the automatic stay by not giving
5 them the money or violated our fiduciary duties by not paying
6 the debt. I'm not clear which. It depends who you ask. But
7 you know, Your Honor, they really don't have their story
8 straight. Thank you.

9 THE COURT: All right. Mr. Meth?

10 MR. METH: Thank you, Your Honor. Very briefly.
11 It's more in the context of a clarification than anything else.
12 It's clear that we do not have any current cash collateral
13 issues. To the extent that there might be cash collateral
14 issues, I think the Court has made clear, as well have counsel
15 for the debtor, that those issues can be addressed in the
16 future, either upon the proposed sale of a major Summerlin
17 business unit or hopefully in the context of a component part
18 of a Summerlin business unit. And our only request in that
19 regard would be that we would get notice with respect to that
20 so that we could come before Your Honor and argue our case at
21 that time.

22 The only real issue that exists at this point is that
23 unlike many of the other parties before Your Honor, we have a
24 situation where we have unencumbered property that is going to
25 be subject to a first lien of the DIP lender where no adequate

1 protection has been offered to the holders and my client with
2 respect to the liens that are being provided pursuant to the
3 DIP order. And that is our concern and that is our issue.

4 THE COURT: But you don't have a security interest in
5 the property.

6 MR. METH: No, that is correct, Your Honor. We do
7 not at this point.

8 THE COURT: So on what basis are you entitled to
9 adequate protection of your interests?

10 MR. METH: As previously cited in our papers and as
11 raised this morning, not to burden the record, pursuant to
12 Section 4.05 of the CSA agreement, pursuant to the fiduciary
13 duties and pursuant to the restructur --

14 THE COURT: You have contractual rights.

15 MR. METH: Correct, and we also recognize --

16 THE COURT: And what rights under the Bankruptcy Code
17 do you have?

18 MR. METH: Only the concept of adequate protection,
19 Your Honor, in the broadest sense. We recognize, as Ms.
20 Goldstein said earlier today, that to the extent that it's an
21 executory contract, that will be addressed at a later time
22 also. Today is not the date for that either. But I just
23 wanted to make clear for the record that our situation was
24 based on the taking of unencumbered property, encumbering it
25 with no apparent indication of any benefit whatsoever being

1 received and no adequate protection being received in that
2 context. And I think Your Honor otherwise understands my
3 position well, and unless Your Honor has any further questions,
4 I thank the Court for its indulgence.

5 THE COURT: Thank you.

6 MS. GOLDSTEIN: Your Honor, just one point in
7 response regarding the Summerlin properties. We will be making
8 a motion that deals with sales of lots in master planned
9 community. The debtor does sell lots in the ordinary course
10 and we will have a motion that requires notice for certain
11 sizes that we might have to notice to the committee. But we
12 haven't come to the Court with that yet. We want to be sure
13 that nothing we say here today requires any special notice with
14 respect to the Summerlin properties beyond what is covered in
15 any further court order.

16 MR. STAMER: Your Honor, I apologize for getting up.
17 I'm not responding to that. And I do not believe this is in
18 the nature of a reservation of rights, and if it is I
19 apologize. It has to do with cash management, and I believe
20 Your Honor's going to rule on cash management in connection
21 with the DIP loan. And this will take me sixty seconds.

22 Your Honor, we had requested -- let me take a step
23 back. The Court knows that pursuant to the cash management
24 system, cash will flow between and among the various debtors
25 and to and from certain nondebtors. The committee's concern

1 was that we believed we needed a certain amount of transparency
2 and collaboration with the company in connection with those
3 flows of money.

4 We had asked the company for a protocol, a formal
5 protocol for dealing with projects that we would refer to as
6 being on the bubble that maybe shouldn't continue to be funded
7 to the extent they exist. And the company was unwilling to
8 agree with protocol. But what the parties did agree to, the
9 company and the committee, was that we would work
10 collaboratively and transparently. The company would give us
11 the benefit of everything that was going on. And hopefully,
12 once again, we would agree to the appropriate treatment of
13 projects, if there were any, that really should not be funded.
14 And if, in fact, there were projects that should not be funded
15 and we couldn't agree upon it, then we would come back to the
16 Court for your assistance. That's really the nature of the
17 agreement, Your Honor, and we're satisfied with the cash
18 management order as revised and with that caveat on the record.
19 Thank you, Judge.

20 THE COURT: All right.

21 MR. HOLTZER: Your Honor, just a brief response.
22 Again, Gary Holtzer, Weil, Gotshal & Manges for General Growth.
23 What we have discussed with Mr. Stamer and the committee is
24 that we will be coordinating and consulting with the committee.
25 We will continue, as we have during this DIP process and cash

1 collateral and adequate protection process, to flow information
2 to them and have a good and healthy dialogue about what's going
3 on.

4 I don't know that I would go so far as Mr. Stamer
5 said to let him know everything that's going on. There are
6 certain things, of course, that we won't be able or in a
7 position to share with the committee as they will be privileged
8 or otherwise part of deliberations that we'll have on the
9 debtors' side. Ultimately, the decisions will be the debtors,
10 but we've been working --

11 THE COURT: I think the parties here have enough
12 experience in administering large Chapter 11 cases that they'll
13 be able to coordinate what needs to be coordinated in the case.

14 MR. HOLTZER: We appreciate that, Your Honor.

15 THE COURT: I'm confident in that. I don't think we
16 can predict or micromanage everything that comes up in the
17 future. And I'm sure the parties will be able to find a modus
18 operandi.

19 MR. HOLTZER: Thank you, Your Honor.

20 THE COURT: Anything else from any other party who
21 wishes any issue dealt with today?

22 MR. STROCHAK: I just have one brief response to Mr.
23 Rosenberg, Your Honor. That's it.

24 THE COURT: All right.

25 MR. STROCHAK: I'm not quite sure about the signature

1 card, and obviously we can find out the answer to that.

2 THE COURT: I'm not making any findings today as to
3 what was done or what wasn't done. We're looking forward not
4 backwards.

5 MR. STROCHAK: The only point I would make, Your
6 Honor, is that the point illustrates why this cash trap is
7 really no substantively different than anybody else's. It was
8 still under the control, such that the debtors' bank had
9 control over the signature card, as Mr. Rosenberg is
10 suggesting. So it really demonstrates that this is really no
11 different than anything else that was going on with respect to
12 other traps. That was my only point, Your Honor.

13 THE COURT: All right. Anyone else? All right.
14 I'll take a brief recess and give you a decision in just a few
15 minutes.

16 (Recess from 4:32 p.m. to 4:51 p.m.)

17 THE COURT: The following constitutes the Court's
18 finding of fact and conclusions of law with regard to all
19 issues that have not been previously dealt with on the record.

20 These cases obviously involve many debtors and a
21 corporate organization of extraordinary complexity. Because of
22 the sheer size of the cases, the Court was faced with several
23 dozen objections to a motion for use of cash collateral and for
24 approval of a DIP order.

25 Almost all of the objections filed by the mortgage

1 lenders have been resolved. A few have been specifically
2 reserved. The reservations or objections of the unsecured
3 creditors' committee have been fully resolved. And it
4 shouldn't be forgotten, as we spend most of the day today
5 properly on the protection of the secured creditors, recalling
6 that there are hundreds of millions of dollars, if not billions
7 of dollars of unsecured debt in these cases as well as
8 interests of equity holders, although obviously I'm not making
9 any suggestion or determination with regard to the position of
10 the equity in these cases.

11 I appreciate very much that the debtors and the
12 lenders have made heroic efforts to resolve objections. A
13 process was undertaken where the debtors obtained not only the
14 benefits of a better DIP loan from a business perspective, and
15 I understand how difficult that is, particularly in these times
16 where DIP loans are not easy to obtain. Also the terms of the
17 DIP loan were designed not to impinge on the rights of the
18 secured creditors or to preclude the secured creditors from
19 preserving their positions in these cases and their fundamental
20 interests. Indeed, the parties in negotiating the DIP loan,
21 were so successful that the real objections that are
22 outstanding are objections as to the provisions for adequate
23 protection rather than the provisions of the DIP loan per se.
24 And let me turn to adequate protection.

25 As to the question of adequate protection, there is

1 no dispute that the rents from the various properties
2 constitute the lenders' cash collateral pursuant to 552 of the
3 Bankruptcy Code. The lenders, or some of them, assert that
4 their rights to this cash collateral are inviolate. That, of
5 course, is not the law. The Bankruptcy Code does not provide
6 that a debtor has to escrow its cash from rents on real
7 properties when it is most likely to need that cash most, after
8 a bankruptcy filing.

9 I have no intention of dwelling on Section 552 except
10 to note, as I did earlier, that although it confirms to
11 mortgagees an interest in rents without regard to state law, it
12 provides that the Court can, after notice and a hearing, and
13 based on the equities of the case, order otherwise with regard
14 to a continuation of a security interest in rents post-
15 petition. The debtors do not propose to rely on Section 552
16 and no parties have argued that to me. Reliance on the
17 exception in 552 would have been extraordinary, at least in my
18 experience.

19 But the debtors propose to use provisions relating to
20 cash collateral that have been used in hundreds if not
21 thousands of cases and to provide adequate protection in its
22 most garden variety standard form. They propose to provide the
23 lenders with a replacement lien on the cash that has been
24 up-streamed, equal to the lower of the cash transferred or the
25 diminution in value of the lenders' interest in their pre-

1 petition collateral, drawing in as a consequence of the
2 existence of these cases.

3 There is no indication in the record that the
4 replacement lien will not be sufficient, but the debtors
5 further propose to pay each of the lenders, including the one
6 lender that has declared itself under-secured, Citicorp, an
7 amount equivalent to interest at the nondefault rate and to
8 maintain the properties in accordance with the pre-petition
9 agreements. The rents and the properties will indirectly pay
10 the costs of maintaining and preserving the properties. I do
11 not see, on this record, any serious issue regarding the less
12 successful properties funding the more successful properties.
13 The debtors' projections do not indicate that even without the
14 DIP that they would run out of cash in the foreseeable future.

15 In any event, the issue is whether the properties are
16 adequately protected against a diminution in the value of their
17 collateral. The debtors have demonstrated that for purposes of
18 the hearings and for purposes of entry of this order on cash
19 collateral and on the DIP loan. As I have said several times
20 during these hearings, no lender is precluded from requesting
21 from the debtors and then coming to court for additional
22 adequate protection if necessary.

23 Let me turn now to the remaining specific objections
24 of certain lenders, and particularly the objection that
25 covenants and conditions in the loan documents -- the pre-

1 petition loan documents -- should not be overridden by virtue
2 of the bankruptcy filing of their borrower or borrowers.

3 It is absolutely standard black letter law that
4 covenants and conditions are inevitably breached in bankruptcy.
5 Even agreements designed to govern actions in bankruptcy are
6 generally unenforceable. See In re Trans World Airlines, Inc.
7 261 B.R. 103, 114 (Bankr. D. Del. 2001) and a later case 275
8 B.R. 712, 723, in 2002 in Trans World Airlines as well. The
9 most basic covenant is to pay on time. The breach of this
10 covenant in some bankruptcy cases is total. The debtors'
11 ability and agreement to pay current interest means that the
12 breach, from a fundamental perspective, is only partial in
13 these cases. And those lenders who have been relying on a
14 consistent flow of funds equivalent to interest will not have
15 their expectations diminished, at least at this stage of the
16 cases.

17 The Deutschebank group of lenders, the so-called
18 Fashion Show and Palazzo lenders, nevertheless argue that cash
19 traps should not be lightly overridden. But the law is that
20 they are entitled to adequate protection. They say in their
21 surreply, quote, "As for the first lien on cash concentrated in
22 a centralized account maintained under the debtors' centralized
23 cash management system, it is obvious that such a lien does not
24 constitute the 'indubitable equivalent' of the Fashion Show and
25 Palazzo lenders' interests in the cash collateral at the

1 Fashion Show property level."

2 The Bankruptcy Code does not, however, require that
3 the lenders receive the indubitable equivalent of the
4 protection provided by their pre-petition security agreements.
5 Section 361 of the Bankruptcy Code uses the word "indubitable
6 equivalent" as one of several examples of the adequate
7 protection, but it provides all of the examples in the
8 disjunctive using the word 'or'.

9 The debtors are providing the secured creditors with
10 adequate protection as that term has been used in innumerable
11 bankruptcy cases since the adoption of the 1978 Code. A
12 replacement lien to replace the lien on the cash being used,
13 interest at the nondefault rate, to establish that a particular
14 debtor will not likely fall behind in a commitment to maintain
15 and preserve the properties in accordance with the pre-petition
16 documents.

17 It is recognized that secured creditors who enter
18 into pre-petition agreements with the debtor are sometimes
19 disappointed by a subsequent bankruptcy filing. It is
20 important to observe, however, that when Congress wanted to
21 give secured lenders more of an adequate protection, it knew
22 how to do so. Section 1110 of the Bankruptcy Code provides the
23 debtors have to perform under aircraft pre-petition documents
24 after sixty days unless agreed otherwise under certain such
25 documents. There is no such provision for real estate lenders.

1 Nor is it reasonable at this stage of the case to demand
2 further protection in an order forbidding the debtors' use of
3 cash when the debtors do need the cash in order to administer
4 these cases in the interests of all parties.

5 Nothing in this decision is intended to decide any
6 issues other than cash management and cash collateral and
7 approval of the DIP order. I take serious exception to some of
8 the arguments made in Amici speech by the Commercial Mortgage
9 Securities Association and Mortgage Bankers Association who
10 speak of systemic risk from a case like this. Obviously, a
11 case like this raises difficult issues because there are so
12 many debtors. However, all debtors' interests and all secured
13 lenders' interests will be respected in accordance with fairly
14 standard provisions and understandings. Contrary to the
15 assertions of the Commercial Mortgage Securities Association,
16 we are not substantively consolidating any estates. We are
17 only deciding the matters before the Court today. Even the
18 Association recognizes, in discussing the separateness of these
19 entities, the fact that the parties did receive, I assume, in
20 all of these matters, reasoned judicial opinions that recognize
21 that the Bankruptcy Code does exist.

22 There is no implication in the record before me that
23 the debtors' proposed use of cash collateral should be
24 restricted to situations where the lender is over-secured.
25 Citibank will receive the same protection as other lenders:

1 cash equivalent to interest with a determination at a later
2 date as to the application, maintenance of the properties, and
3 a replacement lien. On this record there is no need and no
4 desire on the part of the debtors to deal with the question
5 whether some of the lenders or all of them, other than
6 Citibank, are over-secured.

7 As to the position of those creditors who are
8 interested in the Summerlin properties, obviously they do not
9 have a security interest. They are not entitled to adequate
10 protection per se, and their interests are not being adversely
11 affected in the bankruptcy sense by the lien being granted to
12 the DIP lender. On the other hand, I am certain that they will
13 get adequate notice of any issues relating to their properties
14 and I'm not hearing any of those issues today.

15 I will therefore sign the DIP order and the cash
16 collateral order.

17 As to the cash management order, there hasn't been
18 much discussion of the terms of it today. I signed an interim
19 order. I do not recall whether the order stated that the
20 debtors were merely rolling over their pre-petition cash
21 management program. I do not view that as a required finding
22 for purposes of finding a final cash management order. I do
23 think that I need not find today the precise issues relating to
24 the Palazzo and other Fashion Show lenders and the pre-petition
25 situation in terms of cash management because the debtors'

1 proposed use of cash is appropriate and there appear to be
2 sufficient protections provided for the secured lenders.

3 So I will sign appropriate orders. If there's any
4 fine tuning needed for the orders, you certainly might spend a
5 few minutes tending to that. I very much appreciate the fact
6 that the secured lenders have organized themselves. And I
7 assure every lender that they will receive a hearing as to
8 their specific issues.

9 Now, there's an issue -- not an issue, but I gather
10 the next omnibus hearing date is the 27th of May? Is that
11 correct?

12 MR. HOLTZER: Correct, Your Honor.

13 THE COURT: I have at least one motion to dismiss
14 already filed, is that right? I do think -- and I'll leave it
15 to the parties to discuss -- that if more than one party is
16 interested in a legal issue, it is certainly preferable to hear
17 all such motions on the same day. And if they're motions to
18 dismiss, I think they should be heard very, very shortly. But
19 as far as I'm concerned, there is no reason not to enter the
20 DIP order in the form that it's been provided.

21 Now, I also had on the calendar today an order to
22 show cause by the debtors to enter a confidentiality order.
23 And there were some objections to that.

24 MR. HOLTZER: Your Honor, if I might, before we get
25 to that. Again, Gary Holtzer, Weil, Gotshal & Manges for

1 General Growth.

2 THE COURT: Why don't you come to the microphone so
3 everyone can hear you?

4 MR. HOLTZER: Thank you, Your Honor. I only
5 interrupt for a moment because I wanted to confirm that in
6 addition to the cash management order and the DIP order, the
7 Court would be entering the tenant obligation order.

8 THE COURT: The tenant -- yes, of course.

9 MR. HOLTZER: And finally, Your Honor, we'll need to
10 have a brief sidebar with the committee. I understand that the
11 DIP lender wants to place something on the record about
12 notification in connection with the conversion option in the
13 DIP loan, and we need to show that, as it's just been handed to
14 me. I believe it is only a noticing time period issue, but we
15 promised we would fork that through. Is that correct, Mr.
16 Feldman?

17 MR. FELDMAN: Not entirely true or correct. It was
18 part of the deal that was struck in one of our 2 in the morning
19 nights. It was an item that wasn't, for whatever reason, was
20 not included that people wanted to make sure was included.

21 THE COURT: What is the language? Do you have the
22 language in your hand?

23 MR. HOLTZER: Sure.

24 THE COURT: Why don't you read it into the record,
25 and where would it go?

1 MR. HOLTZER: There is a schedule, Your Honor, to the
2 loan agreement, schedule 3.1A.

3 THE COURT: 3.1A?

4 MR. HOLTZER: Correct. That is the schedule that is
5 entitled "Loan conversion terms", and it's where the terms and
6 conditions that apply to the conversion are contained. And the
7 language would be inserted into that schedule following the
8 definition of "maximum conversion shares". And the language
9 is, "Notwithstanding the prior language, the general partner
10 shall have the right to withdraw its conversion election and
11 such election shall be of no further force and effect if the
12 general partner determines that the rights offering
13 contemplated by clause Q in the first sentence is not unlikely
14 to be a qualified rights offering."

15 Excuse me for one moment, Your Honor.

16 (Pause)

17 THE COURT: Did you want that double negative in
18 there?

19 MR. FELDMAN: Just to give it context, Your Honor,
20 and then the debtor can speak as well. It has to do -- the
21 language -- Mr. Holtzer just read an exception to the language
22 that was added. It has to do with the timing of when they give
23 the DIP lender notice of their intent to convert the DIP to
24 equity at the end of the case. And there were supposed to be
25 three -- the earlier of three dates, and only two made it into

1 the ultimate draft, and there was a third. But then what Mr.
2 Holtzer read is the exception to the third. It's a pretty
3 technical point and it just has to do with the timing of when
4 we're going to get notice that we're going to be converted to
5 equity. And I think --

6 THE COURT: When you're going to get notice?

7 MR. FELDMAN: When we're going to get notice that
8 we're going to be converted into equity.

9 THE COURT: All right.

10 MR. HOLTZER: Your Honor, why don't we just proceed
11 for a moment to do the order to show cause so I can make sure
12 that the language is absolutely accurate with the DIP lender?

13 THE COURT: Very good.

14 MR. STROCHAK: Thank you, Your Honor. Adam Strochak,
15 Weil, Gotshal for the debtors. The purpose for the order to
16 show cause was to get a confidentiality order entered on an
17 expedited basis so that we could push documents out to the many
18 secured lenders and others who requested documents in
19 connection with the debtors' first day motions.

20 The intention was for that order only to cover
21 documents that got produced in connection with the first day
22 motions, not to be an order of general applicability for the
23 entire case. Now that we have -- a coordinating counsel has
24 stepped up for the secured lenders, I think it will be possible
25 for us to go and perhaps negotiate a more comprehensive

1 protective order that would govern exchange of documents during
2 the entire Chapter 11 case. And we'll certainly work on that
3 as the case moves forward.

4 There were a couple of objections to what I would
5 characterize as our interim order. The objections seem to fall
6 in two general camps. One was that one group wanted the burden
7 on the debtors to have to come in and establish that a
8 protective order was appropriate for particular documents on a
9 document by document basis. We didn't think that was workable,
10 and in fact, it has proven unnecessary in this case because
11 we've been able to work out confidentiality issues with anyone
12 who wanted to offer documents into evidence or use them in any
13 other way in this case. So it seems unnecessary, and frankly
14 moot, at this point to have that burden.

15 The second one was the idea of sharing information.
16 Each of the secured lenders received information, wanted to be
17 able to share it with other secured lenders. We weren't
18 comfortable with that, Your Honor. We had property-specific
19 information that went out to secured lenders, information about
20 tenants, information about rents, stuff that we consider highly
21 confidential, and we didn't think it was appropriate for that,
22 certainly not at this stage of the case, to be shared broadly
23 among the entire secured creditor constituency.

24 I think that more or less summarizes the objections.
25 Your Honor, we think the order is simple and straightforward.

1 It was designed simply to expedite the production of documents
2 for the hearing and ensure that confidential information that
3 was being provided would be subject to reasonable protections,
4 giving everybody an opportunity to challenge the debtors'
5 designation of documents as confidential if it was necessary,
6 although it's proven unnecessary in connection with these
7 hearings.

8 So with that, Your Honor, we have made changes to the
9 exhibit to address as many of the objections as we could. I
10 have a redlined version of the order that I can present to Your
11 Honor. I don't think it resolves all of the objections. I
12 don't know who else wants to pursue objections at this point,
13 but we're obviously happy to respond to anyone who does. So
14 with that --

15 THE COURT: Well, we could simply roll it over and
16 put this on the calendar for May 27th so to give a chance for
17 everybody to be heard before then and perhaps resolve any
18 issues. I don't know what production you're going to be making
19 between now and then. I hope everybody will take a little bit
20 of a break from these cases. But let me hear from anyone else.

21 MR. STROCHAK: We'd appreciate that opportunity we
22 have for the 27th.

23 THE COURT: Sir?

24 MR. CROSS: We had an objection on file, Your Honor,
25 and we agree with that suggestion.

1 MR. SAMSON: Let's just roll it over. As for first
2 days it's probably moot now anyway. And let's see if we can
3 all work together to come up with something that everyone can
4 live with. And just for the record, I'm Paul Samson or Riemer
5 & Braunstein for the 2008 facility lenders.

6 MR. STROCHAK: That's certainly acceptable to us,
7 Your Honor, so long as the record is so ordered that the
8 existing confidentiality protections will be maintained with
9 respect to anything that we have shared already.

10 THE COURT: I think that goes without saying, but
11 I'll also order that.

12 MR. STROCHAK: Thank you, Your Honor.

13 THE COURT: All right. And we'll put this on for May
14 27th at 11.

15 MR. STROCHAK: Very good.

16 THE COURT: And let's see if we can get the last
17 clause.

18 (Pause)

19 MR. HOLTZER: Okay, Your Honor, let me try to put the
20 last point on the record. Again for the record, Gary Holtzer,
21 Weil, Gotshal & Manges for the company. This is a change
22 Schedule 3.1A to the loan conversion terms.

23 In paragraph 1 there is a clause that ends with --
24 clause Y that ends with the term "for the POR". We would
25 insert in that clause a new clause that would say in clause Z,

1 "The date a motion is filed seeking an order approving a
2 backstop purchaser in connection with a potential qualified
3 rights offering, and subject to the entry of such order." We
4 would insert that in the first part.

5 And then we would add language at the end of that
6 sentence, after the defined term "maximum conversion shares",
7 and that language would say, "Notwithstanding the prior
8 language, the general partner shall have the right to withdraw
9 its conversion election, and such election shall be of no
10 further force and effect if the general partner determines that
11 the rights offering contemplated by clause Z in the first
12 sentence is not or is unlikely to be a qualified rights
13 offering."

14 THE COURT: All right.

15 MR. FELDMAN: We're agreed on the language, just I
16 think it befitting that I end the hearing with -- just to be
17 clear, we reserve our rights in connection with what is or
18 isn't a qualified rights offering. And I think we have that,
19 but I just want to make it clear that we had that right. Thank
20 you, Your Honor.

21 THE COURT: As I understand it, rights offerings were
22 a thing of the past, but they may come back again in the
23 future, is that correct?

24 MR. FELDMAN: Maybe, we'll see.

25 THE COURT: We'll see.

1 MR. FELDMAN: A lot of time and effort is spent on
2 qualified rights offerings and in this DIP.

3 THE COURT: All right. Anything else? Thank you
4 very much.

5 ALL: Thank you, Your Honor.

6 (Whereupon these proceedings were concluded at 5:20 p.m.)
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I N D E X

R U L I N G S

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C E R T I F I C a T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a
true and accurate record of the proceedings.

LISA BAR-LEIB

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Date: May 15, 2009